No. 15-802

In the Supreme Court of the United States

RESOURCE INVESTMENTS, INC., ET AL., PETITIONERS

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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QUESTIONS PRESENTED

1. Whether the Court of Federal Claims (CFC) lacked jurisdiction under 28 U.S.C. 1500 to adjudicate petitioners' permanent takings claim against the United States because that claim shared "substantially the same operative facts" as petitioners' separate district court challenge to the government action underlying petitioners' takings claim.

2. Whether Section 1500 is properly interpreted to deprive the CFC of jurisdiction over a monetary claim for just compensation during the period of time that the plaintiff has another suit pending for or in respect to that claim and, if so, whether such an interpretation would be unconstitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 785 F.3d 660. The opinion of the Court of Federal Claims (Pet. App. 21a-56a) is reported at 114 Fed. Cl. 639.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2015. A petition for rehearing was denied on August 18, 2015 (Pet. App. 57a-58a). On October 8, 2015, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 16, 2015, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, petitioner Land Recovery, Inc. established petitioner Resource Investments, Inc. for the purpose of locating and purchasing a new landfill site in Pierce County, Washington. C.A. App. A280.[1] In 1987, petitioners purchased for development a 320-acre property in Pierce County overlying the Central Pierce County Aquifer System, which serves as the primary drinking-water source for more than 400,000 residents. *Id.* at A282. "[M]unicipal solid waste disposal is a highly regulated industry," and its participants must navigate "a labyrinthine regulatory process to obtain the necessary permits to construct the landfill." *Id.* at A280. Complicating matters further, petitioners' project involved "the single largest wetland fill ever permitted in the state of Washington," and "may have been the largest and most involved landfill ever contemplated in [the] State." *Id.* at A331. This case involves petitioners' challenge to one part of the regulatory process that petitioners invoked: petitioners' request to the United States Army Corps of Engineers (Corps) for a permit under Section 404 of the Clean Water Act, 33 U.S.C. 1344.

a. In August 1990, after the local officials with whom petitioners were working, as well as petitioners' own consulting firm, concluded that petitioners should obtain a Section 404 permit from the Corps, petitioners applied to the Corps for such a permit. See C.A. App. A285. In March 1992, the Corps provided public notice of the proposal. *Id.* at A1516. The Corps received approximately 200 public comments unani-

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[1] This brief refers to petitioners individually and collectively as "petitioners."

mously opposing the project. *Ibid.* The Corps also received recommendations from the Environmental Protection Agency (EPA), the United States Fish and Wildlife Service, and the National Marine Fisheries Service, all of which recommended that the Corps deny the permit for environmental reasons. *Id.* at A1516-A1517. In light of those comments, the Corps determined that an Environmental Impact Statement (EIS) on the proposal should be prepared under the National Environmental Policy Act (NEPA), 42 U.S.C. 4332. See Pet. App. 3a; C.A. App. A1518.

The EIS process ended at an impasse after the Corps, as part of its analysis of practicable alternatives to the proposal under 40 C.F.R. 230.10(a), requested additional information from petitioners to address the feasibility of long-hauling waste by truck to locations outside of the county. C.A. App. A285-A286 & n.25. Petitioners failed to submit such information and, instead, in June 1996, requested that the Corps terminate the EIS process. *Id.* at A286; CFC Doc. 130, Ex. 1, at 7. The Corps honored petitioners' request later that month and, on September 30, 1996, denied petitioners' Section 404 permit application. Pet. App. 3a; C.A. App. A286.

In October 1996, petitioners filed a district court action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, for judicial review of the Corps' September 1996 permit decision. C.A. App. A380-A488 (complaint). Counts I and II alleged that the Corps erroneously asserted jurisdiction over petitioners' landfill project, *id.* at A425-A435, while Counts III and IV alleged that the Corps' decision was arbitrary and capricious, *id.* at A435-A486. APA "review should be [limited to] the administrative record."

Camp v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam). Petitioners, however, promptly invoked judicial process to depose Corps and EPA employees. CFC Doc. 236, Ex. A, at 5, 19-29. After the government objected, petitioners withdrew their subpoenas but stated that they would continue to pursue discovery in the APA action and planned to use that discovery (and discovery obtained from federal employees in state proceedings) in the APA action. *Id.* at 5-6. In response, the Corps moved the district court to limit judicial review to the administrative record. *Id.* at 2, 6. Petitioners opposed that limitation, arguing that they were "entitled to take discovery outside the administrative record" to explore the Corps' allegedly improper decision-making process. CFC Doc. 237, Ex. 7, at 2, 4. The district court granted the government's motion, C.A. App. A621, and upheld the Corps' decision on review, *id.* at A286.

In July 1998, the Ninth Circuit reversed and remanded. *Resource Invs., Inc.* v. *United States Army Corps of Eng'rs*, 151 F.3d 1162 (9th Cir. 1998). The court held that the Corps lacked authority to require a permit under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, because the Resource Conservation and Recovery Act, 42 U.S.C. 6941 *et seq.*, conferred regulatory authority over the siting, design, and construction of a solid waste landfill on wetlands on the EPA, which may implement its authority through EPA-approved state permitting programs. 151 F.3d at 1168-1169. The Ninth Circuit denied the government's petition for rehearing en banc. C.A. App. A287.

On March 16, 1999, the district court on remand vacated the Corps' decision that had denied petitioners' Section 404 permit application. C.A. App. A511.

b. Meanwhile, petitioners proceeded through the state regulatory process. Under state law, petitioners were required to obtain numerous state and local permits to construct and operate the landfill. C.A. App. A282, A287 (identifying over a dozen types of required permits); cf. *Weyerhaeuser* v. *Tacoma-Pierce Cnty. Health Dep't*, 96 P.3d 460, 462, 467 (Wash. Ct. App. 2004) (discussing certain permits for petitioners' landfill project). Petitioners' attempts to obtain those permits triggered a protracted regulatory process.

For example, although Pierce County issued petitioners a conditional land use (CU) permit in 1992, that permit was invalidated on state-court judicial review because the County failed to provide adequate process to the public and failed to "adequately address alternatives to the proposed project" in its environmental-impact statement. *Weyerhaeuser* v. *Pierce Cnty.*, 873 P.2d 498, 509 (Wash. 1994). On remand, in 1996, the County again granted a CU permit, but it required petitioners to obtain a wetlands permit under county wetlands regulations that had been adopted after petitioners submitted their CU-permit application. C.A. App. A284. Petitioners responded to the new wetlands-permit requirement in two ways. First, petitioners sought state-court review to challenge the requirement, lost in the trial court, and prevailed on appeal in May 1999; but in November 1999, the Washington Supreme Court granted the County's petition for discretionary review. *Weyerhaeuser* v. *Pierce Cnty.*, 976 P.2d 1279, 1282, 1286 (Wash. Ct. App.), review granted, 989 P.2d 1139 (Wash. 1999), review dismissed, No. 68220-8 (Feb. 7, 2000). Second, petitioners applied for and obtained the county wetlands permit, which opponents then challenged in separate

state-court proceedings. See Stipulation and Agreed Order of Dismissal at 2, *Weyerhaeuser* v. *Pierce Cnty.*, No. 96-2-08494-3 (Wash. Super. Ct. May 12, 2000). Petitioners prevailed in those proceedings, which became final after the County petitioned for state supreme court review to decide whether petitioners could be required to obtain the wetlands permit. *Ibid.* The conclusion of those proceedings thus mooted the state supreme court's review proceedings, which the supreme court subsequently dismissed. See *id.* at 3.

As a result, by the latter half of 1999, petitioners had obtained the CU permit required by state law and satisfied its wetland-permit requirement. Petitioners secured other requisite permits and, in December 1999, started receiving waste at their Pierce County landfill. C.A. App. A98; Pet. App. 4a.

2. Petitioners also filed a Fifth Amendment takings claim in the Court of Federal Claims (CFC) based on the Corps' decision denying their request for a Section 404 permit. This certiorari petition concerns whether the CFC lacked jurisdiction over that claim.

a. In May 1998, while petitioners' APA action challenging the Corps' permit denial was pending on appeal in the Ninth Circuit, petitioners initiated the present action by filing a complaint in the CFC, alleging that the Corps' permit denial constituted a permanent taking of petitioners' property for which petitioners were owed just compensation, C.A. App. A71. See *id.* at A70-A92 (complaint). From September 1998 through January 2001, petitioners engaged in protracted and lengthy discovery concerning the Corps' decision-making process, see CFC Docket Entry Nos. 14-92; cf. Pet. 15 n.9, and from April 2002 until August

2005, the litigation stayed dormant while the matter was referred to a CFC judge to explore settlement, CFC Docket Entry Nos. 116-122.

In October 2005—more than six years after petitioners' APA challenge resulted in the vacatur of the Corps' permit-denial decision by the district court, see p. 4, *supra*—petitioners filed an amended complaint in the CFC. C.A. App. A94-A125; cf. 28 U.S.C. 2501 (six-year statute of limitations). The Amended Complaint abandoned the permanent takings claim that petitioners had originally asserted, alleging instead that the Corps' conduct during the regulatory process caused "extraordinary delay" that constituted a temporary taking of petitioners' property lasting until the Ninth Circuit's decision that directed vacatur of the Corps' decision became final in early 1999. C.A. App. A98-A99.

The CFC subsequently denied the parties' summary judgment motions on the temporary takings claim, concluding, *inter alia*, that petitioners had not sufficiently established that the Corps' processing of petitioners' permit application caused any delay-based harm in light of the ongoing state administrative and judicial-review proceedings that lasted into late 1999. *Resource Invs., Inc.* v. *United States*, 85 Fed. Cl. 447, 519-524 (2009).

b. In 2011, this Court, in *United States* v. *Tohono O'odham Nation*, 563 U.S. 307, interpreted 28 U.S.C. 1500's restriction on CFC jurisdiction, overturning earlier Federal Circuit precedent that had supported CFC jurisdiction in this case.

The Tucker Act grants the CFC jurisdiction over monetary claims "against the United States" 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). Section 1500, however, 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," *i.e.*, when the CFC claim and the plaintiff's pending suit in another court are "based on substantially the same operative facts." *Tohono*, 563 U.S. at 311, 317 (citation omitted).

Before *Tohono*, the en banc Federal Circuit had held, contrary to the government's argument, that Section 1500 does not prohibit CFC jurisdiction when such factual overlap is present so long as the two actions involved "distinctly different relief." *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545, 1548-1549 (Fed. Cir. 1994) (en banc) (rejecting the Federal Circuit's earlier 1992 en banc conclusion on this issue). In 2011, *Tohono* adopted the government's position, holding that Section 1500 bars jurisdiction over a CFC claim when another suit is "based on substantially the same operative facts, regardless of the relief sought." 563 U.S. at 317. The fact that a plaintiff may seek only damages in the CFC and non-monetary equitable relief in district court thus does not negate application of Section 1500's jurisdictional bar.

Less than two months after *Tohono*, the government moved to dismiss petitioners' claims. C.A. App. A362. The CFC granted that motion and dismissed. Pet. App. 21a-56a.

3. The court of appeals affirmed. Pet. App. 1a-20a. The court held that that Section 1500 barred CFC jurisdiction because the claim in the complaint filed in May 1998—that the Corps' permit denial constituted a permanent taking—was based on "substantially the same operative facts" as petitioners' then-pending district court action challenging the Corps' permit decision as arbitrary and capricious. *Id.* at 6a-16a.

a. The court of appeals concluded that Section 1500 precluded jurisdiction because the Corps' decision denying a Section 404 permit and the harm it allegedly caused were "central" operative facts to both petitioners' Claim IV in district court and to their takings claim in the CFC. Pet. App. 7a-8a. Claim IV, the court explained, challenged the "Corps' decision to deny the permit" as being "arbitrary and capricious," which if correct, would have required the matter to be remanded to the Corps to reconsider its decision "under the proper standards." *Id.* at 8a (citation omitted). The CFC claim, in turn, alleged that the Corps' permit-denial decision was a permanent taking because the Corps' decision allegedly "further[ed] no legitimate government interest" and deprived the site of all economic use. *Ibid.* (citation omitted). In both contexts, the court concluded, the "operative facts" involving the "allegations with respect to the denial of the [Section 404] permit" and petitioners' related "economic loss" were the same. *Id.* at 16a.

The court of appeals rejected petitioners' argument that Section 1500 was inapplicable because Claim IV and their permanent takings claim involved "additional—and different—operative facts." Pet. App. 9a; see *id.* at 9a-16a. The court noted that *Tohono* analyzed Section 1500's test by "analogiz[ing]

§ 1500" to the doctrine of claim preclusion and by explaining that Section 1500's focus on operative facts operates similarly to that doctrine. *Id.* at 9a-10a (citing *Tohono*, 563 U.S. at 315-316). In light of *Tohono*'s explanation that "'it was not uncommon'" in the 19th century, when Congress enacted Section 1500's predecessor statute, "'to identify a claim for preclusion purposes based on facts rather than relief,'" and *Tohono*'s conclusion that its decision gave effect to "'the principles of preclusion law embodied in [Section 1500],'" the court of appeals determined that it was appropriate to evaluate factual overlap in this context by drawing on such "res judicata" principles. *Id.* at 9a (quoting *Tohono*, 563 U.S. at 316) (alteration omitted).

The court of appeals stated that mere "background facts * * * should not be considered" when applying Section 1500. Pet. App. 12a. The court also noted that the claim-preclusion principles that *Tohono* identified looked, as relevant here, to whether two actions "'arise out of one and the same act or contract,'" and that such an inquiry is "narrower than the modern transactional test" for preclusion. *Ibid.* (quoting *Tohono*, 563 U.S. at 316). The court found it "informative," however, to review authorities concerning the transactional test because it shared some similarities with earlier preclusion principles. *Ibid.* Such authorities, the court concluded, showed that the fact that a plaintiff may assert "[d]ifferent legal theories" in two cases does not prevent application of claim preclusion, even though the claims might "emphasize different elements of the facts" or "depend on different shadings of the facts." *Id.* at 13a (citation omitted). The court accordingly found no basis for declining to apply Section 1500. *Id.* at 16a.

b. The court of appeals declined to address petitioners' argument that the "temporary takings claim" that they raised in their October 2005 amended complaint involved different operative facts than their APA action and, for that reason, was not barred by Section 1500. Pet. App. 16a-17a. The court determined that petitioners did "not sufficiently allege a temporary takings claim in their original complaint" under the governing pleading standard. *Ibid.* And the court further explained that Section 1500's analysis turns "upon the state of things at the time the action [is] brought," such that a jurisdictional defect under Section 1500 cannot be cured by the parties' subsequent actions or the termination of the plaintiff's other suit. *Id.* at 17a-18a. As a result, the court declined to consider petitioners' "more extensive temporary takings allegations" in their amended complaint. *Id.* at 17a.

c. The court of appeals similarly rejected petitioners' argument that Section 1500 should be construed to avoid "constitutional difficulties" that petitioners asserted could result from dismissing their constitutional takings claim. Pet. App. 18a. The court found "no significant constitutional issue" presented for two reasons. *Id.* at 18a-19a. First, petitioners could have avoided any jurisdictional problem under Section 1500 because they "could have dismissed and refiled" their CFC takings action after the Ninth Circuit's decision. *Id.* at 19a & n.9. The applicable six-year statute of limitations (28 U.S.C. 2501), the court explained, had yet to expire when the Ninth Circuit in 1998 directed that the Corps' permit decision be vacated. Pet. App. 19a & n.9. Second, the court of appeals explained that, under *Tecon Engineers, Inc.*, v. *United States*,

343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966), Section 1500 is read to bar jurisdiction only if a plaintiff files suit in another court before filing its related claim in the CFC. Pet. App. 18a-19a. Although the court noted that the government has argued that "*Tecon's* order-of-filing rule" is wrong, the court explained that *Tecon* remains law of the circuit and, under *Tecon*, plaintiffs may avoid dismissal by filing a CFC claim before filing a related action in another court. *Id.* at 19a & nn.7-8.

ARGUMENT

Petitioners contend (Pet. i, 12-16) that the court of appeals adopted a test for determining jurisdiction under Section 1500 that looks only to whether a CFC claim and a suit in another court "arise out of the same transaction," and that such a focus in this case on what they characterize as "a single seed fact or transaction," Pet. 12, was erroneous. Petitioners further contend (Pet. i, 17-27) that Section 1500 should not be construed to bar CFC jurisdiction over constitutional takings claims. Petitioners misread the decision of the court of appeals. In any event, the judgment of the court of appeals is correct and is consistent with this Court's decisions construing Section 1500. Moreover, petitioners fail to identify any significant difficulty for diligent litigants prospectively navigating Section 1500's jurisdictional limitations, now that those limitations have been clarified by *United States* v. *Tohono O'odham Nation*, 563 U.S. 307 (2011). No further review is warranted.

1. a. 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*, 563 U.S. at 311.

Two suits are "for or in respect to" the same claim if they are "'based on substantially the same operative facts.'" *Tohono*, 563 U.S. at 311, 317 (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 if 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 315; cf. *ibid.* ("Developing a factual record is responsible for much of the cost of litigation," and "[d]iscovery is a conspicuous example."). "[T]hat purpose is no less significant today" than when Congress enacted Section 1500's predecessor in 1868. *Ibid.*; see *id.* at 310.

The court of appeals, like the CFC, correctly held that the CFC lacked jurisdiction over petitioners' permanent takings claim. The court of appeals explained that petitioners' claim that the Corps' permit-denial decision constituted a permanent taking shared "substantially the same operative facts" as petitioners' APA action challenging that same decision by the Corps. Pet. App. 7a-8a (citation omitted). More specifically, the nature of and rationale behind the Corps' administrative decision and the associated economic

impact were "central" facts—and "not merely * * * background fact[s]"—in the APA action (which would involve review of the decision and its underlying analysis to determine if the decision was "arbitrary and capricious") and petitioners' takings claim (which similarly would involve review of the decision to determine, *inter alia*, if it advanced a "legitimate government interest" and would frustrate reasonable investment-backed expectations). See *ibid.* (citations omitted). That conclusion is particularly appropriate here because petitioners did not pursue a conventional APA action in district court; they instead sought to engage in discovery to probe beyond the administrative record in a manner similar to the discovery that petitioners would later pursue in their takings case. See p. 4, *supra*.

b. Petitioners seek review on the question whether Section 1500's substantially-the-same-operative-facts standard "mean[s] 'arising out of the same transaction.'" Pet. i. Petitioners base that request on their assertion that the court of appeals "adopted a test that looks to whether the claims arise out of the same transaction," and that such an "expansive transactional test" erroneously focuses on "a single seed fact or transaction," rendering a "substantial overlap of operative facts * * * irrelevant." Pet. 12, 16; see *id.* at 12-16. Petitioners significantly misread the court of appeals' decision, which is consistent with this Court's decisions interpreting Section 1500.

The court of appeals discussed the "transactional test" for claim preclusion only in response to petitioners' contention that its APA action and CFC takings claim implicated "additional—and different—operative facts" beyond the "common" operative facts

that the court of appeals identified as the "central" ones. Pet. App. 7a, 9a, 12a; see *id.* at 9a-16a. The court did not find that Section 1500 was triggered by the existence of a mere "single seed fact or transaction" that played no central role in the two cases, as petitioners suggest. See Pet. 12. Moreover, although the court looked to claim-preclusion principles, it emphasized that the appropriate analysis was "*narrower* than the modern transactional test." *Id.* at 12a (emphasis added). The court referred to certain "authorities on the modern transactional test" because they could be "informative" in resolving petitioners' arguments. *Ibid.* The court ultimately concluded that it does not matter whether two actions involving "[d]ifferent legal theories" will "depend on different shadings of facts" or "emphasize different elements of facts," *id.* at 13a (citation omitted), and concluded that petitioners' APA action and takings claim had sufficient factual overlap to trigger Section 1500's bar, *id.* at 16a.

That conclusion is consistent with *Keene*. In *Keene*, the Court held that Section 1500 applies even when "two actions [a]re based on different legal theories." 508 U.S. at 212. By their very nature, actions based on different legal theories will involve at least some different operative facts. All that Section 1500 requires is "substantial factual overlap." *Tohono*, 563 U.S. at 311.

The court of appeals' reliance (Pet. App. 15a-16a & n.5) on its own precedential decision in *Trusted Integration, Inc.* v. *United States*, 659 F.3d 1159 (Fed. Cir. 2011), reflects that the court did not, as petitioners assert (Pet. 12), adopt a test that merely "looks to whether the claims arise out of the same transaction."

In *Trusted Integration*, the plaintiff technology company alleged that it provided its computer-security software to the Department of Justice and worked with the Department to develop the software to meet the security needs of other agencies. 659 F.3d at 1161-1162. The Department, however, allegedly developed its own software by accessing the company's database to study the system's architecture, and ultimately offered its own software, rather than that of the company, for sale to agencies. *Id.* at 1162. The company filed suit in district court and the CFC alleging multiple claims in each court under different legal theories. *Ibid.* The Federal Circuit held that the CFC lacked jurisdiction over the company's claims that the Department breached an implied agreement to engage in a joint venture and a duty of good faith and fair dealing, because the company had asserted parallel claims in district court. *Id.* at 1165-1167.

Significantly, however, the Federal Circuit in *Trusted Integration* concluded that Section 1500 did *not* bar the company's claim that the Department breached its licensing agreement by accessing the company's software to develop the Department's own product, even though the company asserted a district court claim alleging that the Department's development and promotion of its own alternative product violated its promise to use the company's software. 659 F.3d at 1167-1168. Although the CFC and district court claims arose from the same general transaction involving the Department and the company, the court of appeals reasoned that the district court claim was "based on the fact that [the Department] developed an alternative and promoted it," such that "*how* the alternative was developed [was] not a legally operative

fact" in district court. *Id.* at 1168. By contrast, the CFC breach-of-licensing-agreement claim turned on the fact that the Department "cop[ied] the [company's] program to aid [the Department's] development of an alternative." *Ibid.* The court of appeals in this case thus recognized that *Trusted Integration* teaches that even when two cases share "background facts," Section 1500 does not bar CFC jurisdiction if the "legally operative facts"—*i.e.*, the "facts necessary to establish [the] two different causes of action" raised in the CFC and the other court—are "differ[ent]." Pet. App. 16a n.5. But as the court correctly concluded in this case, those "circumstances are not at issue here." *Ibid.*[2]

c. In any event, this case would be a poor vehicle for the Court to decide how to apply Section 1500's substantially-the-same-operative-facts test.

First, the court of appeals analyzed Section 1500's application only to petitioners' permanent takings claim. Pet. App. 7a-16a. The court expressly declined to decide whether Section 1500 would independently bar their temporary takings claim because petitioners did not adequately plead such a claim in their original

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[2] Like the court of appeals in this case, *Trusted Integration* looked to claim preclusion principles to inform its analysis. 659 F.3d at 1168-1170 & n.5. The court emphasized that although *Tohono* indicated that Section 1500's "analysis should consider the principles of res judicata to which [*Tohono*] pointed," *id.* at 1164, *Tohono* did not direct that the court of appeals to adopt—and the court of appeals did not adopt—those claim-preclusion "tests as the standard by which to measure whether two claims arise from substantially the same set of operative facts" under Section 1500, *id.* at 1170 n.5. The court of appeals here appears to have followed the same course. See Pet. App. 9a-10a, 12a-13a, 15a-16a (following *Trusted Integration*).

complaint. *Id.* at 16a-18a. Petitioners have not challenged that fact-bound aspect of the court of appeals' decision in this Court. See Pet. i.

Petitioners' permanent takings claim, however, lost all vitality—and is no longer pressed by petitioners—because the Corps' permit-denial decision on which that claim was based has long since been vacated. It would be anomalous for this Court to review Section 1500's application to a CFC claim that is no longer at issue. And although petitioners would now at best have a temporary takings claim, the court of appeals did not address Section 1500's application to that claim's operative facts. Pet. App. 16a. This case therefore would be an inappropriate vehicle for the Court to decide how Section 1500 should apply to such a claim in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718, n.7 (2005) ("[W]e are a court of review, not of first view.").[3]

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[3] By its terms, Section 1500 operates to deprive the CFC of jurisdiction over a "claim" for or respect to which the plaintiff has a related suit in another court. 28 U.S.C. 1500; see *Tohono*, 563 U.S. at 311. Section 1500 is thus properly applied on a claim-by-claim basis. See *Trusted Integration*, 659 F.3d at 1165-1171 (separately analyzing three CFC claims and holding that Section 1500 barred jurisdiction over two). In this case, however, petitioners' temporary takings claim would face other significant hurdles. Even if petitioners could establish that the Corps' administrative action (which ended when the Corps' decision was vacated on judicial review in early 1999) caused some delay beyond the delay caused by the state regulatory and judicial-review proceedings (which continued through late 1999), see pp. 4-6, *supra*, petitioners failed to file their temporary takings claim until October 2005, C.A. App. A94, more than six years after the Corps' decision had been vacated. See Pet. App. 16a-17a (petitioners' original complaint did not adequately allege a temporary takings claim). The applicable six-year statute of limitations in 28 U.S.C. 2501 is mandatory and

Second, this case does not present typical circumstances under which a plaintiff might file a CFC takings claim while APA proceedings are pending in another court. Rather than allowing APA review to proceed on the administrative record, petitioners invoked judicial process in their APA case in an attempt to secure discovery of additional facts outside the agency record. See p. 4, *supra*. Those efforts raise additional issues concerning the prospect of substantially overlapping facts with petitioners' takings claim, which likewise turned in part on the underlying basis for the permit denial. See p. 9, 13-14, *supra*; Pet. App. 7a-9a, 43a.

2. Petitioners' second question presented asks whether "[Section] 1500 should be construed to preclude Fifth Amendment takings claims" and, if so, whether such a result would be unconstitutional. Pet. i. Petitioners broadly argue that "[Section] 1500 should not be read to apply to constitutional claims" because "[c]onstitutional claims are different" and Section 1500 "does not express a clear intent to bar constitutional claims." Pet. 18; see Pet. 17-27. Petitioners' understanding of Section 1500 is incorrect and cannot be squared with this Court's prior application of Section 1500 to takings claims.

a. Section 1500 applies to preclude CFC jurisdiction over "any claim" if the plaintiff has a related suit pending in another court. 28 U.S.C. 1500. That broad and unqualified use of the phrase "any claim" is incon-

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jurisdictional. *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130 (2008). In any event, because petitioners have not argued in this Court that the court of appeals erred by failing to analyze independently their temporary takings claim under Section 1500, those issues are not properly before the Court.

sistent with petitioners' cramped understanding of the statute as applying only to non-constitutional claims. Indeed, this Court has explained that Section 1500 was a "robust response" to the problem first presented by the cotton claimants, reflecting a "significant jurisdictional limitation" that uses "broad language that bars not only identical but also related claims" in order to "save the Government from burdens of redundant litigation." *Tohono*, 563 U.S. at 312, 314-315. The Congress that enacted Section 1500's predecessor would not have intended the statute to allow cotton claimants to pursue constitutionally grounded claims while simultaneously pursuing related claims in other courts.

Notably, petitioners' position goes even further than the Court of Claims' decision in *Brown* v. *United States*, 358 F.2d 1002 (1966) (per curiam), which this Court ultimately rejected in *Keene*. The Court of Claims in *Brown* initially applied Section 1500 to dismiss for want of jurisdiction a takings claim asserted by a widow and her children because, at the time, the plaintiffs had a related case pending in district court based on "the [same] circumstances." *Id.* at 1003-1004. In that pending district court action, the plaintiffs argued that a federal agency had misinterpreted a statutory provision and, alternatively, that the agency's position, if correct, would result in an unconstitutional taking. *Id.* at 1004. After the district court had dismissed the plaintiffs' alternative takings claim for want of jurisdiction, the Court of Claims on rehearing reinstated the takings claim before it based on its view that Section 1500 did not require it to "deprive plaintiffs of the only forum they have in which to test their demand for just compensation." *Ibid.* *Brown* thus

recognized that Section 1500 could bar a Fifth Amendment takings claim while a related case was pending in another court, but concluded that it should no longer do so once that other case was concluded.

This Court in *Keene* similarly addressed Section 1500's application to a CFC takings claim. 508 U.S. at 204-205. But unlike *Brown*, *Keene* held that, under Section 1500, the CFC lacked jurisdiction over that takings claim because the plaintiff had a related district court action pending at the time that the CFC takings claim was filed. *Id.* at 202, 207-209. Although that district court action was dismissed a mere five days later, *id.* at 204, *Keene* held that Section 1500 "continu[es] to bar jurisdiction over the claim of a plaintiff who, upon filing, has an action pending in any other court 'for or in respect to' the same claim," *id.* at 209. *Keene* thus specifically held that *Brown* did "not survive" its decision. *Id.* at 217 n.12; cf. *id.* at 219-220 & n.3 (Stevens, J., dissenting) (dissenting on the ground that *Brown* correctly concluded that plaintiffs should not be deprived of the "only forum they have in which to test their demand for just compensation") (citation omitted).

b. Petitioners argue (Pet. 21) that, in this case, they were "required to establish [their] property interest in the land or to stem the underlying taking by challenging the governmental action that effected it through an APA action" before they could pursue a CFC takings claim. An APA action, however, was not necessary for plaintiffs to bring a takings action in the CFC. Petitioners thus appear to argue that Section 1500 could operate in a particular situation to put a plaintiff to an "untenable choice 'between securing just compensation for a taking of property'" and seek-

ing to overturn "'the underlying action alleged to constitute a taking.'" Pet. 22 (quoting *Ministerio Roca Solida*, 778 F.3d 1351, 1360 (Fed. Cir.) (Taranto, J., concurring), cert. denied, 136 S. Ct. 479 (2015)). That asserted difficulty, petitioners argue (Pet. 20-21), flows from the fact that plaintiffs cannot bring all possible claims against the United States in a single court, and that a plaintiff in a particular case thus could conceivably be barred by the six-year statute of limitations in 28 U.S.C. 2501 from filing a CFC claim after having pursued APA claims in another court. Petitioners' concern is exaggerated.

A litigant who promptly pursues APA review of agency action in district court can normally be expected to complete that litigation before the CFC's six-year limitations period expires. A properly litigated APA claim should proceed promptly to summary judgment for judicial review based on the administrative record, and a plaintiff who pursues a claim, with appropriate expedition if necessary, can then choose to pursue a CFC claim before the six-year limitations period ends.

Petitioners' own case illustrates that this course was available for petitioners. Petitioners began their APA action in October 1996; the Ninth Circuit resolved petitioners' appeal in July 1998 by directing that the Corps' decision be vacated; and the district court vacated that decision and ended the case in March 1999. See pp. 3-4, *supra*. Had petitioners simply waited until their APA action concluded, they could have filed their CFC takings claim well before the six-year limitation period expired without implicating Section 1500. Alternatively, as the court of appeals recognized, petitioners could have dismissed

their prematurely filed CFC action and filed a new CFC action to assert their temporary takings claim after their APA case had ended. Pet. App. 19a & n.9; see *Tohono*, 563 U.S. at 318 (explaining that a plaintiff "is free to file suit again in the CFC" after its district court action is "complete[d]" "if the statute of limitations is no bar"). Petitioners simply failed to do so.

Petitioners, of course, may have believed that such actions were unnecessary in light of the Federal Circuit precedent that prevailed before *Tohono*. See p. 8, *supra*. And *Tohono* was decided in 2011 after the six-year statute of limitation had run on petitioners' claim. But that transitional difficulty for petitioners provides no sound basis for categorically restricting Section 1500's application so as to render it inapplicable to all takings claims. Cf. *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983) ("A constitutional claim can become time-barred just as any other claim can."). Going forward, a reasonably diligent plaintiff in petitioners' shoes will understand that, in order to comply with the CFC's six-year statute of limitations and Section 1500, it will need to seek prompt APA review and then file a CFC claim when APA proceedings have been completed, if the plaintiff believes at that point that a Fifth Amendment taking has occurred.

Petitioners speculate (Pet. 20) that if Section 1500 is allowed to apply to constitutional claims, it "will * * * strip numerous property owners of their Fifth Amendment right to just compensation." Petitioners, however, fail to identify non-transitional cases—let alone a significant number of such cases in which the plaintiffs have expeditiously pursued their claims—to suggest that their speculation is well-founded. If and

when such a case arises, the Federal Circuit can address it in the first instance. This Court would then have an opportunity to grant review to decide on an as-applied basis whether Congress has provided a constitutionally sufficient opportunity for the plaintiff to pursue a takings claim. By contrast, this case, as the court of appeals concluded, raises "no significant constitutional issue" for review. Pet. App. 18a.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] The court of appeals concluded that Section 1500 did not raise significant constitutional concerns for the additional reason that, under the Federal Circuit's *Tecon* order-of-filing doctrine, a plaintiff may circumvent Section 1500 by filing its CFC claim before its district court action. Pet. App. 18a-19a. Although the *Tecon* rule currently governs in the Federal Circuit, the government continues to maintain that *Tecon* should be overruled. But like *Tohono*, this case does not present an opportunity to reexamine the *Tecon* issue because petitioners filed their district court action before filing their claims in the CFC. See *Tohono*, 563 U.S. at 314-315 ("The *Tecon* holding is not presented in this case because the CFC action here was filed after the District Court suit."). Even if *Tecon* were to be overruled, however, the application of Section 1500 in this context does not present any significant constitutional issue for review for the reasons previously discussed.