

No. 09-846

---

---

IN THE  
**Supreme Court of the United States**

UNITED STATES OF AMERICA,  
*Petitioner,*

v.

TOHONO O'ODHAM NATION,  
*Respondent.*

---

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

---

**BRIEF OF THE CHAMBER OF COMMERCE OF  
THE UNITED STATES OF AMERICA AS  
AMICUS CURIAE IN SUPPORT OF  
RESPONDENT**

---

Robin S. Conrad  
Amar D. Sarwal  
National Chamber  
Litigation Center, Inc.  
1615 H St. NW  
Washington, DC 20062  
(202) 463-5337

Jonathan L. Marcus  
*Counsel of Record*  
Theodore P. Metzler  
COVINGTON & BURLING LLP  
1201 Pennsylvania Ave. NW  
Washington, DC 20004  
(202) 662-5000

*Counsel for Amicus Curiae The  
Chamber of Commerce of the  
United States of America*

September 2010

---

---

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT .....	6
I. The Text And Purpose Of § 1500 Demonstrate That It Removes Jurisdiction Only When A Plaintiff Is Seeking The Same Relief In A Case Pending In Another Court.....	7
II. The Government’s Overly Broad Reading Of § 1500 Would Lead To Unjust Results. ....	12
A. The Government’s Interpretation Would Prevent Claimants From Obtaining All The Relief To Which They Are Entitled.....	12
B. The Government’s Interpretation Would Preclude Complete Relief For A Broad Spectrum Of Claimants.....	15
III. The <i>Tecon</i> Order-Of-Filing Rule Is Not Before This Court. ....	21

CONCLUSION .....23

## TABLE OF AUTHORITIES

### CASES

	<b>Page</b>
<i>Alaska v. United States</i> , 32 Fed. Cl. 689 (Fed. Cl. 1995) .....	20
<i>Barnhart v. Sigmon Coal Co.</i> , 534 U.S. 438 (2002) .....	7
<i>Black v. Cutter Labs.</i> , 351 U.S. 292 (1956).....	23
<i>Boston Five Cents Savings Bank v. United States</i> , 864 F.2d 137 (Fed. Cir. 1988) .....	20
<i>California v. Rooney</i> , 483 U.S. 307 (1987).....	23
<i>Casman v. United States</i> , 135 Ct. Cl. 647 (1956) .....	4, 7, 12, 13
<i>Cellco Partnership v. United States</i> , 54 Fed. Cl. 260 (Fed. Cl. 2002) .....	5, 15, 16
<i>Deltona Corp. v. United States</i> , 228 Ct. Cl. 476 (Ct. Cl. 1981).....	20, 21
<i>eBay Inc. v. MercExchange, L.L.C.</i> , 547 U.S. 388 (2006) .....	14
<i>FCC v. NextWave Personal Communications, Inc.</i> , 537 U.S. 293 (2003).....	15
<i>Frantz Equipment Co. v. United States</i> , 120 Ct. Cl. 312 (Ct. Cl. 1951).....	12
<i>Glidden Co. v. Zdanok</i> , 370 U.S. 530 (1962) .....	9
<i>Great-West Life &amp; Annuity Ins. Co. v. Knudson</i> , 534 U.S. 204 (2002) .....	14
<i>Hobbs v. McLean</i> , 117 U.S. 467 (1886).....	8

<i>Johnson v. De Grandy</i> , 512 U.S. 997 (1994).....	23
<i>Keene Corp. v. United States</i> , 508 U.S. 200 (1993).....	<i>passim</i>
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004) .....	8
<i>Loveladies Harbor, Inc. v. United States</i> , 27 F.3d 1545 (Fed. Cir. 1994) .....	6, 19, 20
<i>Matson Navigation Co. v. United States</i> , 284 U.S. 352 (1932).....	12, 13
<i>Ross v. Bernhard</i> , 396 U.S. 531 (1970).....	14
<i>Santa Clara v. United States</i> , 215 Ct. Cl. 890 (1977) .....	5, 17, 18
<i>Tecon Eng'rs, Inc. v. United States</i> , 343 F.2d 943 (Ct. Cl. 1965).....	6, 21
<i>Tohono O'odham Nation v. United States</i> , 559 F.3d 1284 (Fed. Cir. 2009) .....	23
<i>Truckee-Carson Irrigation Dist.</i> , 223 Ct. Cl. 684 (Ct. Cl. 1980).....	21
<i>United States v. King</i> , 395 U.S. 1 (1969).....	9
<i>UNR Industries, Inc. v. United States</i> , 962 F.2d 1013 (Fed. Cir. 1992) .....	19
<i>Wilson v. Rousseau</i> , 45 U.S. 646 (1846) .....	11

## STATUTES & REGULATORY MATERIALS

28 U.S.C. § 1500 .....	<i>passim</i>
28 U.S.C. § 1491 .....	9, 13
Pub. L. No. 92-415, §1, 86 Stat. 652 (1972) .....	13

**OTHER**

Paul Frederic Kirgis, *Section 1500 and the  
Jurisdictional Pitfalls of Federal  
Government Litigation*, 47 Amer. Univ. L.  
Rev. 301 (1997)..... 9, 15

S. Rep. No. 92-1066 (1972)..... 13

## INTEREST OF AMICUS CURIAE<sup>1</sup>

Serving as the principal voice of the business community, the Chamber of Commerce of the United States of America (“the Chamber”) is the largest federation of businesses, companies, and associations in the world. With substantial membership in each of the fifty states, the Chamber represents 300,000 direct members and indirectly represents the interests of over three million businesses and organizations of every size, in every business sector and from every region of the country. An important function of the Chamber is to represent the interests of its members in critical issues before the Supreme Court of the United States, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. The Chamber also seeks to advance those interests by filing briefs in cases of importance to the business community. The Chamber thus has participated as *amicus curiae* in many other cases before this Court, including the related case, *Keene Corp v. United States*, 508 U.S. 200 (1993).

Many of the Chamber’s members are large and small businesses that have extensive relationships

---

<sup>1</sup> Each party has consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

with federal government agencies. These relationships often give rise to claims for damages and equitable relief against the government. Thus, the primary issue presented in this case—whether 28 U.S.C. § 1500 prevents parties with both equitable and money damages claims against the government arising from a common factual nexus from pursuing complete relief—is of great concern to Chamber members.

The membership of the Chamber disagrees with the government's position that § 1500 forces claimants to choose between money damages claims that may be heard only in the Court of Federal Claims and claims for equitable relief that in most instances must be heard in federal district court. That reading of § 1500 is inconsistent with its text and purpose, and would lead to inequitable results.

### **SUMMARY OF THE ARGUMENT**

1. The text and purpose of 28 U.S.C. § 1500 make clear that it does not oust the Court of Federal Claims of jurisdiction over a claim for money damages unless the plaintiff also has pending a suit seeking the same relief against the United States or one of its officers in another court.

Section 1500 employs the word “claim” in its ordinary sense to mean a demand for particular relief, as shown both by this Court's contemporaneous use of the term at the time § 1500 was adopted and by contemporaneous dictionary definitions. In the Court of Federal Claims and its predecessors, a claim for particular relief has always meant a claim for money damages. Thus, the only



claims that are within the court's jurisdiction—and therefore within the scope of § 1500—are claims for money damages. Section 1500 may only divest the claims court of jurisdiction over such a money damages claim if the plaintiff has pending another suit “for” that claim or “in respect to” that claim. A suit “for” a particular monetary damages claim is simply a duplicative suit in another court, whereas a suit “in respect to” a particular money damages claim could differ as to the defendant or the theory of relief.

This reading of the statutory text comports with the original, modest purpose of Section 1500, which Congress enacted to prevent cotton claimants from continuing to file multiple suits to recover money damages for the seizure of their property during the Civil War. Section 1500 therefore divests the claims court of jurisdiction only in those cases where the plaintiff is pursuing the same relief in multiple courts.

Petitioner's contrary argument that § 1500 encompasses cases seeking different relief is unpersuasive. Although the statute does apply to duplicative claims against both a government official and the United States, Petitioner is incorrect that such suits seek “fundamentally different relief.” The identity of the defendant does not change the substance of the relief sought. Petitioner is likewise incorrect that § 1500's application to claims brought by a plaintiff's assignee means that it applies to claims seeking different relief. An assignee stands in the shoes of the plaintiff, so an assignee's suit can

seek only the same relief to which the plaintiff is entitled.

2. The government's interpretation of § 1500 would go well beyond the provision's limited purpose to prevent duplicative lawsuits and would instead cut off legitimate claims and subject claimants to arbitrary and inequitable results.

a. More than fifty years ago in *Casman v. United States*, the Court of Claims held that § 1500 does not divest the court of jurisdiction if the plaintiff seeks different relief in the claims court<sup>2</sup> than he seeks in another court. 135 Ct. Cl. 647, 648 (1956). In *Casman*, the claims were for back pay and reinstatement of an employee, which could not have been brought together in either the district court or the claims court. Analyzing the text and purpose of the statute, the claims court held that it did not apply to suits separately seeking equitable relief and money damages.

The government now urges this Court to discard that long-established interpretation, arguing that § 1500 should bar even cases seeking different relief so long as the cases are "associated in any way." This interpretation would produce unjust results. Equitable relief and money damages are different by their nature. Where a single factual predicate gives rise to claims for both kinds of relief,

---

<sup>2</sup> For simplicity, this brief uses "claims court" to refer to the court known over time as the Court of Claims, the United States Claims Court, and the Court of Federal Claims.

they are not substitutes for one another, but are instead necessary components of providing a complete remedy. Adopting the government's interpretation would go beyond the purpose of § 1500 to force claimants to choose a single forum in which to pursue their money damages claim, and would instead force them to choose between two distinct remedies when Congress has entitled them to both.

b. Cases demonstrating the inequities of the government's position arise in a wide range of circumstances. Where a plaintiff seeks an injunction, declaratory judgment, or the reversal of administrative action against the government in district court, there often is also a claim for damages caused by the government action the plaintiff seeks to prevent or reverse.

For example, in *Cellco Partnership v. United States*, the FCC's inability to deliver reauctioned wireless spectrum licenses to the successful bidder gave rise to both a claim challenging the administrative decision not to provide a full refund of the bidder's deposit and a claim for money damages caused by the failure to deliver the licenses. 54 Fed. Cl. 260 (Fed. Cl. 2002). Similarly, in *Santa Clara v. United States*, a federal electricity provider's refusal to deliver power to a municipality gave rise to both an equitable claim to ensure the provision of certain power levels and a contract claim for overpayments the city made to another provider to compensate. 215 Ct. Cl. 890 (1977). And in *Loveladies Harbor, Inc. v. United States*, the Army Corps of Engineers' denial of a fill permit generated both an administrative claim seeking to reverse the decision

and a constitutional damages claim for an uncompensated taking. 27 F.3d 1545 (Fed. Cir. 1994).

These cases show that adopting the government's position would have a devastating effect on the ability of many claimants to obtain the full relief that Congress has authorized. The government's interpretation should be rejected because it would improperly transform a limited measure to protect against duplicative claims into a sweeping bar that strikes down legitimate claims and prevents full relief.

3. The rule of *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), is not before this Court. *Tecon* held that § 1500 does not divest the claims court of jurisdiction where the plaintiff had no other suit pending in another court at the time the claims court case was filed, even if a duplicative case is filed during the course of the litigation. Because Respondent filed its district court action *before* filing in the Court of Federal Claims, the *Tecon* order-of-filing rule is not implicated here.

## ARGUMENT

Section 1500 of Title 28 was enacted to solve the narrow problem of duplicative suits brought by "cotton claimants" to recover damages for property seized during the Civil War. *Keene Corp. v. United States*, 508 U.S. 200, 206 (1993). Because they were entitled to recover in the Court of Claims only if they could prove that they had not provided aid to the Confederacy, many of the cotton claimants also sought to recover the same relief by suing the

Treasury officers who had seized their property in their local courts. *Id.* The predecessor to § 1500 was enacted to curb this duplicative litigation. *Id.*

Section 1500 solves the problem of duplicative litigation by divesting the Court of Federal Claims of jurisdiction over “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 . . . acting or professing to act . . . under the authority of the United States.” 28 U.S.C. § 1500. For more than 50 years, the claims court has held that this language does not divest the court of jurisdiction where a case pending in another court arises from the same facts but seeks different relief than the claims court case. *See Casman v. United States*, 135 Ct. Cl. 647 (1956). As explained below, there is no reason to disturb that well-established rule.

**I. The Text And Purpose Of § 1500 Demonstrate That It Removes Jurisdiction Only When A Plaintiff Is Seeking The Same Relief In A Case Pending In Another Court.**

“As in all statutory construction cases,” the Court “begin[s] with the language of the statute.” *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Section 1500 of Title 28 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.”

Section 1500 thus divests the Court of Federal Claims of jurisdiction over a “claim” if the plaintiff has a suit pending in another court against the United States “for” that claim or “in respect to” that claim.

Respondent persuasively explains that § 1500 uses the term “claim” in its ordinary sense to mean a demand for particular relief, and that the contemporaneous usage and definitions of the term at the time § 1500 was enacted demonstrate that “claim” referred to a demand for some specific thing. Resp. Br. 17-19. This Court too applied that usage, observing that it was well understood that a “claim against the United States” meant “a right to demand money from the United States.” *Hobbs v. McLean*, 117 U.S. 567, 575 (1886).

This Court “construe[s statutory] language in its context and in light of the terms surrounding it.” *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).<sup>3</sup> The

---

<sup>3</sup> As Respondent correctly argues, the Court should use the ordinary tools of statutory construction rather than the canon of narrowly construing waivers of sovereign immunity to interpret the language of § 1500. *See* Resp. Br. 36-40. While Section 1500 removes the Court of Federal Claims’ jurisdiction in (continued...)

relevant context here is the jurisdiction of the Court of Federal Claims, which is the subject matter of § 1500. The only “claims” that § 1500 can remove from the Court of Federal Claims’ jurisdiction are claims that would be within the court’s jurisdiction in the first place. “Throughout its entire history,” with very few exceptions, the Court of Federal Claims’ “jurisdiction has been limited to money claims against the United States Government.” *United States v. King*, 395 U.S. 1, 3 (1969); *see Glidden Co. v. Zdanok*, 370 U.S. 530, 557 (1962) (“From the beginning [the claims court] has been given jurisdiction only to award damages, not specific relief.”). Indeed, the court was originally known as the “Court of *Claims*” and is now known as the “Court of Federal *Claims*.” Since its inception, the “claims” part of the court’s name has always referred to claims for money damages. Thus, the only claims that are eligible to be precluded by § 1500 are claims for money damages.<sup>4</sup>

---

specific cases, nothing in the text or history of the statute implies, much less establishes, that the intent was to withdraw the waiver of sovereign immunity that otherwise applies. Moreover, the government’s sovereign immunity interpretation of § 1500 is incongruous in that the supposed retraction of the sovereign immunity waiver would not apply if the district court litigation were completed before suit is filed in the claims court.

<sup>4</sup> The limited exceptions to this principle are a government employee’s claim for reinstatement, which may now be brought in the claims court along with a claim for back pay, *see infra*, n.5, certain claims for reformation or rescission incidental to the money damages remedy in contract actions, and injunctive relief in bid protest cases. *See* Paul Frederic Kirgis, *Section* (continued...)

Section 1500 bars jurisdiction in the Court of Federal Claims when the plaintiff has pending in a different court another suit “for” the money damages claim or “in respect to” the money damages claim. While, as this Court has stated, the inclusion of the phrase “in respect to “ ensures that the statute will not be “rendered useless by the narrow concept of identity,” *Keene*, 508 U.S. at 213, the phrase does that work by reaching not only claims that are identical in all respects, but also claims seeking the same relief for the same injury that are premised on a different legal theory or brought against different federal defendants. *See* Resp. Br. 23-24. That interpretation also accords with the purpose of § 1500, which was meant to preclude the “duplicative lawsuits” that cotton claimants had been filing to obtain compensation for the seizure of their property during the Civil War. *Keene*, 508 U.S. at 206. Such suits were problematic because they sought duplicative recovery for the same injury. If the pending suit seeks *different* relief, therefore, § 1500 does not apply.

The government attempts to rebut this conclusion by arguing that § 1500 “expressly refers” to actions that grant different forms of relief, but those arguments fall flat. *See* Pet. Br. 23-24. Noting that § 1500 precludes jurisdiction where the other pending case seeks relief against a government officer rather than the United States, the

---

*1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 Amer. Univ. L. Rev. 301, 312 & n.70 (1997); 28 U.S.C. § 1491(b).



government asserts that “[a] suit against an individual agent yields fundamentally different relief than a suit against the United States, even when both suits pursue monetary claims.” Pet. Br. 23. This is ostensibly true because a judgment against an individual must be paid out of that person’s assets whereas a judgment against the government is paid with federal funds. *Id.* at 23-24. But whatever practical effect the source of funds may have on the plaintiff’s ability to collect, it is not normally a feature of the relief the plaintiff seeks. For example, it would not be said that two plaintiffs seeking identical damages for identical slip-and-fall accidents are seeking “fundamentally different” relief because one of the defendants has insurance that will pay the judgment while the other defendant does not.

The government similarly contends that § 1500 expressly applies to claims seeking different relief because it includes within its scope pending cases brought by a plaintiff’s assignee, Pet. Br. 24, but that argument too misses the mark. When a plaintiff assigns his claim, the assignee stands in the shoes of the plaintiff, and his right to recovery can be no greater than the plaintiff’s. *See, e.g., Wilson v. Rousseau*, 45 U.S. 646, 703 (1846). The relief ordered to the assignee is thus relief to which the plaintiff is entitled, and the assignee’s right to the relief is limited by the plaintiff’s own right as well as the scope of the assignment. *See id.* The inclusion of assignee cases within the scope of suits that can trigger § 1500 thus does not extend the jurisdictional bar to cases seeking different relief from the Court of Federal Claims case. Rather, it forecloses a potential loophole through which a plaintiff might attempt to

bring duplicative litigation in both the Court of Federal Claims and another court.

**II. The Government's Overly Broad Reading Of § 1500 Would Lead To Unjust Results.**

**A. The Government's Interpretation Would Prevent Claimants From Obtaining All The Relief To Which They Are Entitled.**

In 1956, the Court of Claims first considered whether § 1500 applied to a case brought in that court for money damages where the plaintiff had also brought suit in the district court seeking equitable relief. *Casman v. United States*, 135 Ct. Cl. 647 (Ct. Cl. 1956). The plaintiff alleged that he was wrongfully terminated from his position with the federal government and sought back pay in the Court of Claims. *Id.* at 648. The plaintiff also sued in the District Court, alleging the same facts but seeking only reinstatement to his former position. *Id.* On the government's motion to dismiss for lack of jurisdiction, the Court of Claims found that the purpose of § 1500 "was to prohibit the filing and prosecution of the same claims against the United States in different courts at the same time." *Id.* (quoting *Frantz Equip. Co. v. United States*, 120 Ct. Cl. 312, 314 (Ct. Cl. 1951)).

The court also emphasized this Court's statement that the purpose of § 1500 "was only to require an election between a suit in the Court of Claims and one brought in another court." *Id.* at 649 (quoting *Matson Navigation Co. v. United States*, 284 U.S. 352, 355-56 (1932)). The plaintiff in *Casman* had no ability to "elect between courts" because his

claim for back pay could be brought only in the claims court whereas his claim for reinstatement could be brought only in the district court. The Court of Claims accordingly held that § 1500 did not divest it of jurisdiction over the back pay claim. “To hold otherwise would be to say to plaintiff, ‘If you want your job back you must forget your back pay’; conversely, ‘if you want your back pay, you cannot have your job back.’”<sup>5</sup> *Id.* at 650. The claims court has faithfully adhered to this interpretation of § 1500 for more than fifty years.<sup>6</sup>

The government now seeks to put claimants in the dilemma that would have faced the plaintiff in *Casman* had the government’s interpretation prevailed. The government argues that § 1500 strips

---

<sup>5</sup> Congress subsequently permitted these sorts of employment claims to be brought together in the claims court. Pub. L. No. 92-415, § 1, 86 Stat. 652 (1972) (codified at 28 U.S.C. § 1491(a)(2)).

<sup>6</sup> In the decades since *Casman* was decided, § 1500 has been amended twice, yet Congress has never acted to modify or repeal that decision’s limitation on § 1500. *See* Resp. Br. 30-32. In contrast, when Congress reenacted § 1500 in 1948, it modified the statute to close a loophole this Court found in *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932) (holding that § 1500 did not apply where duplicative claim was brought against the United States, rather than its agent, in another court). *See Keene*, 508 U.S. at 210 n.5. Moreover, when Congress did react to *Casman*, it acknowledged that claims for reinstatement and back pay required two lawsuits. *See* S. Rep. No. 92-1066, at 2 (1972). Instead of overruling *Casman*, however, Congress made it easier for individuals to bring such suits by permitting both claims to be pursued in the claims court. *See supra* n.5.

the claims court of jurisdiction where another pending case “relates to” or is “associated in any way” with the Court of Federal Claims case. Pet. Br. 21. That expansive interpretation would divest the claims court of jurisdiction in a wide swath of cases where a plaintiff’s relationship with the government gives rise to both equitable claims and to claims for money damages. In such cases, the government’s interpretation would deny claimants the full relief to which they are entitled.

That is because equitable relief and money damages are by their nature different forms of relief. *See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (claim for money damages is not equitable in nature); *Ross v. Bernhard*, 396 U.S. 531, 542 (1970) (holding that shareholders’ derivative suit was legal rather than equitable in nature because “[t]he relief sought is money damages”). Indeed, the very availability of equitable relief is premised on the notion, and hinges on a showing, that monetary damages are inadequate. *See, e.g., eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (“According to well established principles of equity . . . [a] plaintiff must demonstrate . . . [that] monetary damages are inadequate” to obtain an injunction.). When both equitable remedies and money damages arise from the same factual nexus, they typically are not interchangeable but rather complement one another to afford a claimant the full relief to which he is entitled. In such cases, one or the other form of relief by itself would be incomplete.

**B. The Government's Interpretation Would Preclude Complete Relief For A Broad Spectrum Of Claimants.**

Cases in which money damages and equitable relief against the government must be pursued in separate courts to obtain complete relief commonly arise where the plaintiff has a claim in the district court seeking an injunction, a declaratory judgment, or the reversal of administrative action. *See* Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 *Amer. Univ. L. Rev.* 301, 340 (1997). In such cases, the government's interpretation of § 1500 would bar the claimant from receiving the complete relief to which it is entitled.

An illustrative case is *Cellco Partnership v. United States*, 54 Fed. Cl. 260 (Fed. Cl. 2002). *Cellco* involved the wireless spectrum license auction that became the subject of this Court's decision in *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003). NextWave was awarded a large number of broadband spectrum licenses as the successful bidder in the FCC's spectrum auction, with its bids totaling nearly \$5 billion. *Id.* at 297. NextWave subsequently encountered difficulty financing the licenses and entered bankruptcy proceedings. *Id.* The FCC eventually canceled the licenses of NextWave and another company for failure to make the agreed payments and reauctoned those licenses. *Cellco*, 54 Fed. Cl. at 261. The successful bidder was Cellco Partnership (also known as Verizon Wireless). *Id.* Verizon paid a \$1.7 billion deposit to the FCC on its \$8.69 billion bid. *Id.*

The FCC was unable to deliver the licenses to Verizon, however, because NextWave successfully challenged the FCC's cancellation of the licenses in the D.C. Circuit. *Id.* At the same time, the FCC issued an order that only partially refunded Verizon's deposit, and it also refused to release Verizon from the contract requiring payment in full of the \$8 billion bid amount within 10 days if and when the FCC reclaimed the licenses from NextWave. *Id.* at 261, 263. Verizon filed a petition for review of the FCC's order in the D.C. Circuit, asserting that the order was unlawful. Verizon also brought suit in the Court of Federal Claims, the only court in which it could seek money damages resulting from the FCC's failure to deliver the licenses. The government moved to stay the claims court action while the district court case was pending, but the court denied the motion, emphasizing that "the D.C. Circuit lacks jurisdiction to decide plaintiff's money damages claim." *Id.* at 263. The court observed that "[e]ven if the FCC agreed to fully refund the deposits, such action would not legally dispose of plaintiff's breach of contract and damages claims." *Id.*

*Cellco* demonstrates the inequities that would result from the government's interpretation of § 1500. Verizon faced a situation in which it was required to keep a multi-billion dollar liability on its books indefinitely, but could not obtain the benefit of using the wireless spectrum that money was meant to purchase. *See id.* If § 1500 were interpreted to divest the Court of Federal Claims of jurisdiction when any matter "associated in any way" with the Court of Federal Claims case is pending, a company

in such a bind could pursue either the reversal of the administrative decision putting it in that bind, or the damages it incurs, but not both.

Similar problems arise when the plaintiff seeks an injunction in another court before bringing a case in the claims court. In one such case, *Santa Clara v. United States*, 215 Ct. Cl. 890, 891 (1977), the city of Santa Clara, California, had entered into a contract with the Central Valley Project (“CVP”), a federally owned water conservation project, to purchase electricity directly instead of through an intermediary. *Id.* at 891. When CVP began withholding electricity from Santa Clara, the city was forced to purchase electricity from the intermediary at six times the price. *Id.* Santa Clara sued in federal district court for equitable relief—a declaration that it was entitled to receive power from CVP and an injunction preventing CVP from refusing to allocate power to the city. *Id.* After the district court remanded the case to the Department of the Interior, Santa Clara brought suit in the claims court seeking damages against the United States for breach of contract. *Id.* at 892.

The Court of Claims denied the government’s motion for summary judgment based on § 1500. The court explained that “plaintiff should [not] be denied the right ever to claim money damages merely because it also seeks to enjoin the Government from

future power allotment violations by requesting injunctive relief in district court.” *Id.* at 892.<sup>7</sup>

As in *Cellco, Santa Clara* shows the potential danger and injustice that would result from adopting the government’s interpretation of § 1500. In *Santa Clara*, the city was faced with two distinct but related problems: *First*, the power authority was not providing the amount of electricity that the city believed it was entitled to. *Second*, the city was paying a significantly higher rate for electricity than it believed it was entitled to. Under the government’s view of § 1500, the city would have been forced to forego any claim for damages against the government so long as its suit to enjoin the power authority from withholding electricity was pending. Alternatively, the city could pursue its claim for money damages, but only if it relinquished the right to a declaration of its rights and an injunction preventing the water authority from continuing or resuming the practice.

These same concerns arise in cases in which federal regulatory action is challenged as effecting a taking of private property without compensation. For example, in *Loveladies Harbor, Inc. v. United States*, the plaintiff was denied a Clean Water Act fill permit from the Army Corps of Engineers in

---

<sup>7</sup> The court ultimately stayed the damages suit because of “unique circumstances” consisting of an escrow agreement between the city and the intermediary power provider that meant that the city could obtain the return of its overcharges as a result of the district court litigation. 215 Ct. Cl. at 891, 893.



connection with a development project. 27 F.3d 1545, 1547 (Fed. Cir. 1994) (en banc). The plaintiff appealed the Corps' decision to the Third Circuit, which affirmed, and also proceeded with a suit in the Court of Federal Claims alleging that the permit denial constituted a taking. *Id.* The Court of Federal Claims held that the permit denial was a taking and awarded \$2.6 million in compensation. On appeal to the Federal Circuit, the government moved to vacate the judgment on the ground that § 1500 barred the regulatory takings claim because the Court of Federal Claims suit was filed while the Third Circuit appeal was still pending.<sup>8</sup> *Id.*

*Loveladies* provides a stark illustration of how the government's interpretation of § 1500 would harm claimants. The claimant in *Loveladies* lost the administrative challenge, but won a \$2.6 million judgment on the claim that the regulation effected a taking. Had the government's interpretation of § 1500 prevailed, *Loveladies* would have lost the \$2.6 million not because there had been no taking, but instead because it guessed wrong as to which claim for relief was more likely to be successful. As the Federal Circuit stated, "[p]laintiffs such as

---

<sup>8</sup> The government's motion followed the en banc decision of the Federal Circuit in *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992), which purported to overrule *Casman*. *UNR*, 962 F.2d at 1022 n.3. This Court's decision in *Keene*, which reviewed the *UNR* decision, noted that the *Casman* rule was not implicated in that case. 508 U.S. at 213 n.6. In *Loveladies*, the en banc Federal Circuit reaffirmed *Casman*. 27 F.3d at 1551.

Loveladies, too, have a right to have the Corps' permit denial reviewed, without being placed in the position of having to give up substantial legal rights protected by the Takings Clause of the Constitution." 27 F.3d at 1555.

These adverse consequences would also arise in many other cases. To catalog just a few:

- In *Alaska v. United States*, 32 Fed. Cl. 689 (Fed. Cl. 1995), the state of Alaska filed in district court a constitutional challenge to federal regulatory restrictions on the export of crude oil and later filed a claim in the Court of Federal Claims for compensation in money damages for a regulatory taking. *Id.* at 695-97.
- In *Boston Five Cents Savings Bank v. United States*, 864 F.2d 137 (Fed. Cir. 1988), the plaintiff bank sought a declaratory judgment in district court that the Department of Housing and Urban Development would violate a mortgage agreement with the bank if the agency were to allow a particular property to be converted to a co-op. *Id.* at 138. The bank subsequently sued in the claims court for monetary damages. *Id.* at 139.
- In *Deltona Corp. v. United States*, 228 Ct. Cl. 476, 482 (Ct. Cl. 1981), like *Loveladies*, a property developer both challenged the denial of a permit from the Army Corps of Engineers in district court and later sued in the Court of Claims, alleging that the federal regulation of

his land constituted an uncompensated taking of his property. *Id.* at 485.

- *In Truckee-Carson Irrigation Dist.*, 223 Ct. Cl. 684 (Ct. Cl. 1980), the plaintiff sought injunctive and declaratory relief in the district court, and contract damages in the claims court, related to federal actions with respect to the use of project waters for the production of power during the winter months. *Id.* at 684.

As these cases demonstrate, adopting the government's far-reaching interpretation of § 1500 would have a devastating effect on the ability of claimants to obtain the full relief that Congress has made available across a wide range of cases. This Court should reject the government's attempt to transform a provision that was designed to be a shield against duplicative claims into a sword that prevents plaintiffs from obtaining complete relief from the government's constitutional, statutory, and contractual violations.

### **III. The *Tecon* Order-Of-Filing Rule Is Not Before This Court.**

In *Tecon Engineers, Inc. v. United States*, the Court of Claims held that because jurisdiction is determined at the time of filing, § 1500 does not divest the court of jurisdiction if no other suit is pending when a case is filed in the claims court, even if such a suit is filed later. 343 F.2d 943, 949 (Ct. Cl. 1965). While admitting that *Tecon* “does not directly apply to this case,” the government nevertheless urges the Court to overrule the case. *See* Pet. Br. 37

& n.8. The Court should decline to do so because the order-of-filing rule is not presented here.

Respondent initially sued the government in the District Court for the District of Columbia on December 28, 2006, and filed its second suit in the Court of Federal Claims “one day later.” Pet. Br. 6. The district court case thus was commenced before the claims court case, and no party suggests otherwise. *Id.* at 6, 37 n.8. The exception to § 1500 stated in *Tecon*, however, applies only if the opposite is true, when the claims court case is filed *before* the district court case. 343 F.2d at 949. These facts thus do not raise the issue of whether § 1500 divests the claims court of jurisdiction if a duplicative claim is later filed in another court.

This Court has already expressly declined to address *Tecon* where the facts did not implicate the issue. *Keene*, 508 U.S. at 216. In *Keene*, as here, the Plaintiff did not address *Tecon* on the merits, and the United States admitted that *Tecon* “would not apply.” Resp. Br., *Keene Corp. v. United States*, No. 92-166, at 36-37. Although the government argued that *Tecon* was wrongly decided, this Court correctly found it “unnecessary to consider, much less repudiate” *Tecon* (508 U.S. at 216), because “this case does not raise that issue.” (*id.* at 209 n.4 (citations omitted)). For the same reason, the Court should decline to address *Tecon* here.

As this Court has repeatedly observed, “[t]his Court ‘reviews judgments, not statements in opinions.’” *Johnson v. De Grandy*, 512 U.S. 997, 1003 n.5 (1994) (quoting *California v. Rooney*, 483

U.S. 307, 311 (1987) (per curiam) and *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)). Although the Federal Circuit cited *Tecon* in response to the government's policy arguments for its far-reaching interpretation of § 1500, see *Tohono O'odham Nation v. United States*, 559 F.3d 1284, 1291-92 (Fed. Cir. 2009), *Tecon* did not determine the outcome of this case—and could not have done so—because it applies only to cases with different facts. Because the *Tecon* rule is not implicated here, the Court should not reach out to address it.

### CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

Robin S. Conrad  
Amar D. Sarwal  
National Chamber  
Litigation Center, Inc.  
1615 H St. NW  
Washington, DC 20062  
(202) 463-5337

Jonathan L. Marcus  
*Counsel of Record*  
Theodore P. Metzler  
Covington & Burling LLP  
1201 Pennsylvania Ave. NW  
Washington, DC 20004  
(202) 662-5000

September 2010

*Counsel for Amicus Curiae  
The Chamber of Commerce of  
the United States of America*