No. 09-846

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

TOHONO O'ODHAM NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR *AMICUS CURIAE* OSAGE NATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The Osage Nation is a federally recognized sovereign Indian nation with a reservation comprising Osage County, Oklahoma. Like the respondent, the Osage Nation is owed fiduciary duties by the United States under various federal statutes and treaties. The United States holds in trust for the benefit of the Osage Nation the mineral estate underlying Osage County, the proceeds of the mineral estate, and various other funds entrusted to it by statute. Act of June 28, 1906, ch. 3572, 34 Stat. 539. The Osage Nation thus has an interest in the proper resolution of the question presented here.[1]

SUMMARY OF ARGUMENT

The Osage Nation agrees with respondent that the text, context, history, and purpose of Section 1500 all foreclose petitioner's effort to transform that statutory shield against duplicative litigation into a sword for eviscerating express waivers of sovereign immunity and forcing parties to choose between incomplete remedies when federal law specifically authorizes both forms of relief.

For example, Congress has expressly waived the United States' sovereign immunity for both money damages claims covered by the Tucker Act, and injunctive actions seeking to halt ongoing violations of law under the Administrative Procedure Act. But

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[1] Each party has consented to the filing of this brief. Pursuant to this Court's 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.

petitioner asks this Court to hold that what Congress gave with one hand, it had already taken away with Section 1500, effectively conditioning the Administrative Procedure Act's grant of a right to seek prospective injunctive relief on the aggrieved party's surrender of any suit for compensation for past harms caused by the violation. Petitioner would likewise force parties to choose between compensation for past harms and stopping new harms under the Hobbs Act or the federal courts' traditional equitable authority to enjoin or issue writs of mandamus to federal officials.

That reading of Section 1500 is not only statutorily troublesome, but also would raise a substantial constitutional question in Just Compensation Clause cases where enforcement of the constitutional right to just compensation would come at the cost of enduring irreparable, non-enjoinable harm from ongoing constitutional and statutory violations.

The problems with petitioner's position do not stop there. Its proposed reading of Section 1500 conflicts with similar language in other statutes, including the original version of the Tucker Act, as well as the Bankruptcy Code. Petitioner would also impede judicial review of any question referred by the Court of Federal Claims to an administrative agency for exercise of its primary jurisdiction, because judicial review of the agency decision would trigger dismissal of the very case from which the referral sprang. Moreover, petitioner's reading would gratuitously upset decades of settled precedent, disregard congressional acquiescence during multiple revisions of the statutory scheme of jurisdiction, and

destroy a wide swath of reliance interests, without any convincing textual justification.

Finally, petitioner's request for an advisory opinion on the validity of the time-of-filing rule in *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (1965), should be rejected here just as the argument was in *Keene Corp. v. United States,* 508 U.S. 200 (1993). The case-or-controversy requirement is an inherent limitation on the question presented and prevents the Court from reaching the *Tecon* issue in this case, particularly given the (understandable) absence of adversarial briefing by the respondent in defense of the longstanding, hornbook time-of-filing rule applied in *Tecon*.

I. SECTION 1500 DOES NOT PRECLUDE COURT OF FEDERAL CLAIMS JURISDICTION WHEN A SECOND SUIT SEEKS DISTINCT RELIEF FOR WHICH SOVEREIGN IMMUNITY HAS BEEN WAIVED

Amicus Osage Nation agrees completely with the respondent's thorough analysis of 28 U.S.C. § 1500 and its logical construction. Properly read, the text and context of Section 1500 do not bar Court of Federal Claims jurisdiction when a second lawsuit seeks a distinct form of relief for which sovereign immunity has been waived. Rather than repeat those same arguments, the Nation offers only the following supplemental points for the Court's consideration.

A. Section 1500 Must Be Construed Harmoniously With Other Waivers Of Sovereign Immunity

While petitioner focuses its (mistaken) arguments exclusively on Section 1500, this Court has long

recognized that the precise meaning of that statute's "awkward formulation" is "elusive." *Keene Corp. v. United States,* 508 U.S. 200, 210 (1993). Accordingly, in construing the statute's text, this Court should hew carefully to established presumptions about the meaning of statutory language, all of which refute petitioner's position.

First, federal statutes should not be construed to contradict or countermand each other. Instead, "equivocal language should be construed so as to secure the most harmonious results." *Calmar S.S. Corp. v. United States*, 345 U.S. 446, 456 (1953); *see, e.g., Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2447 (2010) ("Where the text permits, congressional enactments should be construed to be consistent with one another."); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) (It is a "familiar principle of statutory construction that, when possible, courts should construe statutes * * * to foster harmony with other statutory and constitutional law.").

Yet petitioner's sweeping reading of Section 1500's jurisdictional bar would partially unravel a number of other statutory waivers of sovereign immunity. For example, after Section 1500 was enacted in 1868, Congress enacted both the Tucker Act, waiving the United States' sovereign immunity from certain money damages claims, 28 U.S.C. § 1491(a)(1), and the Administrative Procedure Act, waiving the United States' immunity from suits seeking to enjoin agency action contrary to law, 5 U.S.C. § 706. Petitioner's reading would turn the later enactment of the APA from a law designed to "provid[e] a broad spectrum of judicial review of

agency action," *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988), into a contraction of the Tucker Act's waiver and the erection of a stark choice for aggrieved plaintffs: enforcement of the APA's right to equitable relief would come at the expense of any right to monetary compensation under the Tucker Act. And enforcement of rights under the Tucker Act would require surrender of any right to halt ongoing unlawful governmental action under the APA, no matter how irreparable and immediate the harm. A similar dilemma would be created for parties petitioning courts of appeals for review under the Hobbs Act, 28 U.S.C. § 2432, which gives the federal courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" a variety of agency orders, regulations, and actions. Exercise of that right would now come with a secret penalty revealed nowhere on the face of those laws—the loss of any right to monetary compensation for past harms that, under petitioner's view, are "associated in any way" (U.S. Br. 21) with the Hobbs Act claim.

In addition, although Congress expressly and separately waived the United States' immunity from compensation claims by Indian tribes, 28 U.S.C. § 1505, and provided tribes with an APA-enforceable right to an equitable accounting, American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4011, petitioner would read those remedies as an either/or proposition.

Equally important, under petitioner's view, Congress's direction that the APA should be available whenever "there is no other adequate remedy in a court," 5 U.S.C. § 704, would have to be rewritten to

say that APA review is available when "there is no other adequate remedy in a court, *except that even an inadequate remedy in the Court of Federal Claims will require forgoing APA review*." That is because petitioner's reading would prevent any plaintiff seeking retrospective monetary relief in the Court of Federal Claims from also seeking a declaration and injunction against ongoing violations of the law under the APA. And that APA bar would apply even though this Court has recognized for more than a century that serial damages claims are not an adequate remedy for "perpetually recurring denials of [a plaintiff's] rights." *Franklin Tel. Co. v. Harrison*, 145 U.S. 459, 474 (1892).

General invocations of sovereign immunity principles are no answer to that problem. Petitioner does not dispute that Congress intended the Tucker Act and the APA, and the Indian Tucker Act and the 1994 Trust Fund law, to coexist in full and to provide aggrieved plaintiffs access to both remedies in full. Petitioner, in fact, agrees that sovereign immunity has been waived and that lawsuits could be brought for both damages and equitable relief, provided that the lawsuits are brought back to back.

Petitioner just does not want the lawsuits brought side by side. That argument, however, does nothing to advance sovereign immunity principles. The immunity has already been waived. The liability and resource costs of the two litigations are the same regardless of the order in which they proceed. Petitioner just favors a reading that ensures that the time spent litigating a suit for one remedy will commonly run out the statute of limitations on the second suit. But courts should not construe federal

law to pit one waiver of sovereign immunity against another.

Second, petitioner's reading of Section 1500 would construe the statute as placing a burdensome condition on the district courts' traditional equitable power to issue writs of mandamus to, and to enjoin unconstitutional and *ultra vires* action by, government officials. *See Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 623-624 (1838); 28 U.S.C. § 1361 (authorizing mandamus); *Ex parte Young*, 209 U.S. 123, 162-163 (1908); *Bell v. Hood*, 327 U.S. 678, 684 (1946) (recognizing the "jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (Fifth Amendment and 28 U.S.C. § 1331 provide a remedy for unconstitutional racial discrimination). For example, if a land owner's property is the object of an ongoing governmental trespass or regulatory taking, petitioner's reading of Section 1500 would vitiate the federal courts' authority to enjoin such conduct and to prevent irreparable harm unless the land owner forgoes enforcing his right to compensation in the Court of Federal Claims for harm already inflicted.

This Court, however, will not construe a statute to displace the traditional equitable authority of courts "absent the 'clearest command,'" or an "inescapable inference" to the contrary. *Miller v. French*, 530 U.S. 327, 340 (2000) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979), and *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)); *see also United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496 (2001) (statute must "clearly

provide[] otherwise). Nothing in Section 1500 clearly or inescapably commands such an inroad on the inherent equitable power of federal courts, particularly when that power is directed to halting unconstitutional governmental conduct.

Indeed, petitioner's argument raises constitutional doubts at least with respect to takings claims. For such Fifth Amendment claims, the Constitution itself waives immunity. *See, e.g., Jacobs v. United States*, 290 U.S. 13, 16 (1933). Whether Congress could condition the Constitution's self-executing mandate that just compensation be paid on the property owners' surrender of their right to an injunction against ongoing and unconstitutional irreparable harm is a substantial constitutional question that Section 1500 should be construed to avoid. *See, e.g., French*, 530 U.S. at 341.

Third, Section 1500's jurisdictional limit must be read in the context of similar language in other statutes. Most important among these, it must be read *in pari materia* with the proximately enacted affirmative grant of jurisdiction in the Tucker Act. When enacted in 1887 (shortly after the passage of Section 1500's predecessor), the Tucker Act employed the same "in respect of" a "claim" language. Act of Mar. 3, 1887, ch. 359, §§ 1-2, 24 Stat. 505, 505. And Congress used that language in a manner that is nearly synonymous with the phrasing "for" a claim—a far tighter logical relationship than the nearly boundless "associated in any way" or "has some 'relation or reference to'" meaning advocated by petitioner (Br. 21).

More specifically, the Tucker Act's contemporaneous original language granted the

Court of Claims jurisdiction over, *inter alia*, "[a]ll claims * * * for damages, liquidated or unliquidated, in cases not sounding in tort, *in respect of* which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." Act of Mar. 3, 1887, ch. 359, §§ 1-2, 24 Stat. 505, 505 (reproduced at Resp. Br. 5a-6a) (emphasis added). Read in that context, the "in respect of" language signifies simply those claims for which the hypothesized suability of the United States could be established. That reading was confirmed when Congress deleted the "in respect of" language from the Tucker Act in 1948 "as unnecessary" because "the Court of Claims manifestly, under this section will determine whether a petition against the United States states a cause of action." Revision Notes to 28 U.S.C. § 1491.

Likewise, Section 1500's reference to suits "in respect to" a "claim" focuses on whether the suit seeks the same recovery as the claim pressed in the Court of Federal Claims. That far narrower and statutorily symmetrical reading forecloses petitioner's broad construction of Section 1500 and would preserve the ability of plaintiffs to seek the distinct damages and equitable remedies for which Congress has expressly waived sovereign immunity.

That reading is further supported by language in the Bankruptcy Code. The Code defines a "claim" as either a "right to payment" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5). It then provides that "[a] governmental unit that has filed a proof of claim * * * is deemed to have waived

sovereign immunity *with respect to a claim* against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." 11 U.S.C. § 106(b) (emphasis added). Here, as in other situations where the term "in respect to," "in respect of," or "with respect to" refers to a claim, the phrasing means little if anything more than "for a claim."[2] Indeed, reading it more broadly would expand the waiver of sovereign immunity under the Bankruptcy Act. Petitioner's invocation of sovereign immunity principles thus cuts both ways in construing the "in respect of" language in the Bankruptcy Code (and the original Tucker Act), which Congress presumably used in a consistent manner across analogous federal legislation. *See, e.g., Jones v. Bock,* 549 U.S. 199, 220-221 (2007).

Fourth, Section 1500 should be construed to facilitate operation of the primary jurisdiction doctrine and thus as "effecting a 'symmetrical and coherent regulatory scheme.'" *BP America Prod. Co. v. Burton*, 549 U.S. 84, 99 (2006) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Indeed, that is precisely how this Court implemented Section 1500 in *Pennsylvania Railroad Co. v. United States*, 363 U.S. 202 (1960), and in so doing, this Court took exactly the opposite approach

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[2] Interpreting "in respect to" a "claim" as only a minor variation on the phrasing "for" a "claim" is also consistent with this Court's own recent usage in the sovereign immunity context. *See Lapides v. Board of Regents*, 535 U.S. 613, 617 (2002) ("It has become clear that we must limit our answer to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings.").

to the jurisdictional bar as that advocated by petitioner.

In *Pennsylvania Railroad*, the plaintiff railroad had sued in the Court of Claims to recover from the United States an underpayment of shipping charges. 363 U.S. at 203. In defense, the United States challenged the validity of the relevant tariff. The Court of Claims then stayed the case and referred the issue of the tariff's validity to the Interstate Commerce Commission, *ibid.*, which had primary jurisdiction over that question, *see United States v. Western Pacific R. Co.*, 352 U.S. 59, 62-63 (1956). After the ICC struck down the tariff, the railroad sought judicial review of the ICC order in district court. *Pennsylvania Railroad,* 363 U.S. at 203. The United States then moved in the Court of Claims for dismissal under Section 1500. *Id.* at 203-204. The Court of Claims refused to dismiss the case, instead exercising its jurisdiction to lift the stay and to enter judgment consistent with the ICC's order. *Id.* at 204.

This Court reversed. Critically, it did not hold that the Court of Claims lacked jurisdiction, as petitioner's reading of Section 1500 would dictate. Quite the opposite, this Court held that the Court of Claims should have stayed its proceedings—that is, it should have continued to exercise jurisdiction—pending district court review of the ICC's order. *Pennsylvania Railroad,* 363 U.S. at 205-206. As the Court noted, foreclosing Court of Claims jurisdiction while the agency ruling undergoes district court review would leave any party whose claim for damages against the United States implicates an issue within an agency's primary jurisdiction completely "bound by the [agency's] order although

completely denied any judicial review of that order." *Id*. at 204.

Petitioner's approach thus would wreak havoc with the primary jurisdiction doctrine's traditional division of labor, and the fair opportunity for subsequent judicial review of agency rulings that is part and parcel of that doctrine. That cannot be what Congress intended when it enacted the APA and related agency-review statutes. To the contrary, Congress has reenacted Section 1500 twice with *Pennsylvania Railroad* on the books, without any textual response or even a non-textual complaint. *See also Calmar*, 345 U.S. at 456 (interpreting jurisdictional statutes, including Section 1500, in a manner that avoids subjecting plaintiffs to an unclear jurisdictional rule that would force an uncertain election between district court and the Court of Claims, on the ground that "equivocal language should be construed so as to secure the most harmonious results").

Finally, there is no doubt that the Court must give full effect to jurisdictional limitations prescribed by Congress, and parties cannot, by their conduct, alter those jurisdictional bounds. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). But when the statutory language is as "awkward" as Section 1500 and its meaning as "elusive," *Keene*, 508 U.S. at 210, this Court's construction of such statutory terms should favor (i) the longstanding construction given the statute for half a century by courts and parties alike under *Casman v. United States*, 135 Ct. Cl. 647 (1956); (ii) congressional acquiescence in *Casman* and *Pennsylvania Railroad* for an equally lengthy period of time; and (iii) the

substantial reliance interests of litigants who have sought to protect their rights in the way the courts dictated. *See Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 34 (1895) (when choosing between "either one of two constructions" of ambiguous statutory text, "this court, without departing from sound principle, may well adopt that construction which is in harmony with the settled practice of the executive branch of the government, and with the course of judicial decisions in the circuit courts of the United States, especially if there be reason to suppose that vast interests may have grown up under that practice and under judicial decisions, which may be disturbed or destroyed by the announcement of a different rule").

B. This Court Lacks Jurisdiction To Address The *Tecon* Time-Of-Filing Rule

The Osage Nation agrees with respondent and the Chamber of Commerce that this Court should reject petitioner's extraordinary request that the Court reach out and decide other issues not remotely presented by the Tohono O'odham case. Specifically, the United States urges (Br. 35-39) the Court to overrule the Court of Claims' decision in *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (1965), which applied the well-settled time-of-filing rule for jurisdiction to Section 1500, *id*. at 945-950.

Tecon's time-of-filing jurisdictional rule is a straightforward application of "hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure," *Grupo Dataflux v. Atlas Global Grp.,* 541 U.S. 567, 570-571 (2004). Under that longstanding jurisdictional rule, a court's jurisdiction "depends upon the state of things

at the time * * * the action [is] brought." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003). Thus, if the plaintiff does not "ha[ve] pending" a suit on the same claim in another court when the Court of Federal Claims action commences, 28 U.S.C. § 1500, jurisdiction attaches. In *Keene*, this Court applied that rule to Section 1500. 508 U.S. at 207.

Notwithstanding the time-of-filing rule's hoary pedigree, *Keene*'s application of the rule to Section 1500, the United States' own endorsement of that application in *Keene*, U.S. Br. 29, and the United States' direct support for the rule's application in *Tecon* itself, *id.* at 38 n.19, the United States now argues exactly the opposite, asking this Court to overrule *Tecon* and create an exception to the time-of-filing rule in the *Tecon* scenario. This Court should decline that invitation for three reasons.

First, and most fundamentally, the issue is not presented by this case. As the United States acknowledges (Br. 37 n.8) and respondent explains (Br. 40-41), respondent filed suit in federal district court *first* and the Court of Federal Claims second. The facts of this case thus in no way present the question whether, after suit is filed and jurisdiction has fully vested in the Court of Federal Claims, the later filing of suit in another court can divest the Court of Federal Claims of jurisdiction.

Few principles of law are more basic or well-established than the rule that "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). The essential purpose of

Article III's case-or-controversy requirement is to confine federal courts "to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Lewis*, 494 U.S. at 477 (quoting *Rice*, 404 U.S. at 246). Because this case does not involve the time-of-filing rule at all, this Court "has no authority * * * to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

Second, and relatedly, the issue is not and cannot be subsumed within the Question Presented, because Article III is an inherent limitation on the scope of the Question Presented to this Court for decision in any case. "[T]his court 'is not empowered * * * to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.'" *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920) (quoting *California v. San Pablo & Tulare R. Co.,* 149 U. S. 308, 314 (1893)); *accord United States v. Hamburg Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475, 476 (1916). Thus, regardless of how a question presented might be verbally formulated, Article III dictates that the Court's "power only extends over, and is limited by, the conditions of the case now before [it]." *American Book Co. v. Kansas ex rel. Nichols*, 193 U.S. 49, 52 (1904); *accord Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 370 (1960).

Indeed, in *Keene*, this Court rejected an identical request to go beyond the facts of the case presented and opine on the Federal Circuit's *Tecon* decision because, just as here, "this case does not raise that issue." 508 U.S. at 209 n.4. Underscoring the point, the Court again explained that it was "unnecessary to consider, much less repudiate, the 'judicially created exceptions' to § 1500 found in *Tecon Engineers*" and other Federal Circuit cases precisely because "the facts of this case" do not present the question. *Id.* at 216. The Court made clear that its exercise of certiorari did not license it to provide "an advisory opinion," *id.* at 217 n.13, on legal questions not presented by the "facts of th[e] case," *id.* at 216. The United States thus asks this Court to do precisely what the Court twice refused to do in *Keene*.

Third, the United States' footnoted assertion that the Federal Circuit's brief reference to *Tecon* constituted the *ratio decidendi* of the case (U.S. Br. 37 n.8) lacks merit. The Federal Circuit mentioned *Tecon* only in the course of responding to the government's "policy" argument. Pet. App. 15a-17a. It was not the "line of thought pervading and controlling the whole opinion," *Capital Traction Co. v. Hof*, 174 U.S. 1, 12 (1899). To the court of appeals, it was "dispositive," Pet. App. 9a, "that the Nation's complaint in the Court of Federal Claims seeks relief that is different from the relief sought in its *earlier-filed* district court action," Pet. App. 1a-2a (emphasis added). *See Davis v. Elmira Sav. Bank*, 161 U.S. 275, 286-287 (1896) (*ratio decidendi* of prior opinion is

necessarily limited by the factual "case presented" in the prior ruling).[3]

Furthermore, if the Federal Circuit had actually gone so far as to *decide* a legal question not presented by the facts of the case, then the proper remedy for this Court would be to vacate and remand, not to compound the Article III violation by issuing its own advisory opinion on a legal question "when there is nothing in dispute" on that point in the case, *Little v. Bowers*, 134 U.S. 547, 558 (1890).

At bottom, the United States simply dislikes language in the court of appeals' opinion. But "[t]his Court 'reviews judgments, not statements in opinions.'" *Johnson v. De Grandy*, 512 U.S. 997, 1003 n.5 (1994). When "unnecessarily broad statements are made" by a court of appeals, it is this Court's "duty to look beyond the broad sweep of the language and determine for [itself] precisely the ground on which the judgment rests," *Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956), not to join in and propound declarations about the "proper overall interpretation of the [law]" (U.S. Br. 37 n.8) unhinged from the actual case or controversy presented.

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[3] Beyond that, *Tecon* certainly was far less interwoven with the court of appeals' decision in this case than it was in *Keene*, where the Federal Circuit went so far as to overrule *Tecon*. 508 U.S. at 216. This Court nevertheless concluded that the correctness of *Tecon* was not fairly presented for this Court's review. 508 U.S. at 215-216.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 3, 2010