No. 15-802

IN THE

Supreme Court of the United States

RESOURCE INVESTMENT, INC.
AND LAND RECOVERY INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE CATO INSTITUTE AND THE NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. This case is important to Cato because it involves interpretations of complicated statutory schemes that may undermine constitutional protections for foundational property rights.

The National Association of Reversionary Property Owners (NARPO) is a non-profit educational foundation assisting property owners in the education and defense of their property rights, particularly ownership of property subject to railroad right-of-way easements. See, *e.g.*, *Marvin M. Brandt Revocable Trust* v. *United States*, 134 S. Ct. 1257 (2014) (NARPO as *amicus curiae*).

1. No party's counsel has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. See Rule 37.6. *Amici curiae* provided ten days notice of the filing of this brief to all parties. See Rule 37.2. Both parties have consented to the filing of this brief and such consents are being submitted herewith.

BACKGROUND

In *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011), this Court considered 28 U.S.C. 1500, a Civil War-era statute intended to relieve the United States from responding to duplicative litigation in multiple courts.[2] The *Tohono* majority found that Section 1500 barred the Court of Federal Claims (CFC) from taking jurisdiction of a matter when another case arising from the same operative facts was already pending at the time the case was filed in the CFC. 131 S. Ct. at 1731-32. Importantly, Section 1500 was never intended to be a device allowing the federal government to escape its lawful obligation by denying persons the ability to pursue a meritorious claim against the United States.

But, because the CFC is a court of limited jurisdiction unable to entertain equitable, tort and other claims, the government has exploited Section 1500 and *Tohono* as a procedural device to deny owners whose property the government has taken the ability to pursue otherwise meritorious claims. In combination with other provisions of the Tucker Act,[3] the government is using Section 1500 not as a shield to avoid duplicative litigation but as a sword to escape its statutory and constitutional obligations. Judge Taranto of the Federal Circuit explained that Section 1500 gives rise to "a substantial constitutional question."

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2. Vermont Senator George F. Edmunds, the sponsor of Section 1500, explained, "The object is to put that class of persons [bringing claims for confiscated cotton] to their election either to leave the Court of Claims or to leave the other courts." CONG. GLOBE, 40TH CONG., 2D SESS., 2769 (1868).

3. 28 U.S.C. 1346, *et seq.*

Ministerio Roca Solida v. *United States*, 778 F.3d 1351, 1357 (Fed. Cir. 2015) (Taranto, J., concurring). Members of this Court, numerous lower federal judges, senators, and academics describe Section 1500 as a "purposeless" statute that creates a "judicial quagmire."[4]

Resource Investment's and Land Recovery's (Resource Investment)[5] petition for certiorari provides this Court opportunity to cabin Section 1500 and confirm that this Court's holding in *Tohono* applies only to congressionally-created claims and not to Fifth Amendment takings claims arising directly under the Constitution. We address Resources Investment's second question, whether Section 1500 can preclude an owner's constitutional right to just compensation guaranteed by the Fifth Amendment.

SUMMARY OF ARGUMENT

This Court should grant certiorari to clarify the point that *Tohono* does not (and cannot) be read to hold Section 1500 bars owners from vindicating their constitutionally-guaranteed right to just compensation. This is because the Fifth Amendment right of just compensation is self-executing and requires no waiver of sovereign immunity.

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4. See Argument Section III, *infra*.

5. The petitioners are two related entities, Resource Investments, Inc. and Land Recovery, Inc. For convenience we refer to them collectively as Resource Investments.

ARGUMENT

I. This Court should grant certiorari to affirm the foundational principle that self-executing provisions of our Constitution cannot be abrogated by statute.

A. The Fifth Amendment is a self-executing constitutionally-guaranteed right to compensation not dependent upon any congressional waiver of sovereign immunity.

Resource Investment's (and every other owner's) right to be secure in their property is one of the primary objects for which the national government was formed. In *United States* v. *Jones*, 132 S. Ct. 945, 949 (2012), this Court recalled Lord Camden's holding in *Entick* v. *Carrington*, 95 Eng. Rep. 807 (C.P. 1765), which provided: "The great end for which men entered into society was to secure their property."[6]

To this end, the Fifth Amendment provides: "No person shall *** be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

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6. Madison recognized "Government is instituted to protect property of every sort ***. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his own ***." James Madison (Saul K. Padover, ed.), The Complete Madison (1953), pp. 267-68 (remarks published in National Gazette, Mar. 29, 1792). See also James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998).

This Court held, "In any society the fullness and sufficiency of the securities which surround the individual in use and enjoyment of his property constitute one of the most certain tests of the character and value of government." *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 324 (1893) (quoted and followed by *Olson* v. *United States*, 292 U.S. 246, 254 (1934)); see also *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights ***. That rights in property are basic civil rights has long been recognized."); *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 61 (1993) ("an essential principle: Individual freedom finds tangible expression in property rights."). Justice Brennan explained:

> As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has already suffered a constitutional violation, and *the self-executing character of the constitutional provision with respect to compensation is triggered.* This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a "taking" compensation must be awarded.
>
> *San Diego Gas & Elec. Co.* v. *San Diego*, 450 U.S. 621, 654 (1981).[7]

7. Brennan, J., dissenting on other grounds (internal citations and quotations omitted, emphasis added).

Justice Brennan's view in *San Diego Gas* was expressed in a dissent. But in *First English Evangelical Lutheran* v. *Los Angeles*, 482 U.S. 304, 315-16 (1987), this Court affirmed Justice Brennan's view holding the Just Compensation Clause is "self-executing" and does not "depend on the good graces of Congress."[8]

Indeed, decades before *San Diego Gas* and *First English* the Court found:

> whether the theory *** be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied promise by the Government to pay for it, is immaterial. *In either event, the claim traces back to the prohibition of the Fifth Amendment* ***.
>
> *United States* v. *Dickinson*, 331 U.S. 745, 748 (1947) (emphasis added).

And, decades before *San Diego Gas* and *First English*, this Court noted the fundamental principle that the Fifth Amendment allows:

> the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual

8. See also Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak Nor Obtuse*, 88 Colum. L. Rev. 1630, 1654-1658 (1988).

> more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, *a full and just equivalent shall be returned to him*.
>
> *Monongahela*, 148 U.S. at 325. (emphasis added)

When the government takes property it has a "categorical duty" to pay just compensation. See *Arkansas Game and Fish Comm'n* v. *United States*, 133 S. Ct. 511, 518 (2012); see also *Horne* v. *Department of Agriculture*, 135 S. Ct. 2419, 2429 (2015) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes the entire parcel or merely a part thereof.") (quoting *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002)).

B. Congress may not abrogate by statute a right guaranteed by the Constitution.

Because Resource Investment's right to just compensation arises *directly* from the Constitution, Congress cannot abrogate this right by statute. See *Jacobs* v. *United States*, 290 U.S. 13, 17 (1933) ("the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest") (citing *Seaboard Air Line R. Co.* v. *United States*, 261 U.S. 299, 306 (1923), and *Phelps* v. *United States*, 274 U.S. 341, 343-44 (1927)).

This principle goes back to *Marbury* v. *Madison* when Chief Justice Marshall explained:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written ***. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.
>
> *Marbury* v. *Madison*,
> 5 U.S. 137, 176-77 (1803).

Congress can neither shield the federal government from its preeminent constitutional obligation to justly compensate owners by legislative fiat nor may Congress abrogate constitutional guarantees by adopting a legislative scheme that prevents a property owner from vindicating their constitutional right to just compensation.

II. Granting certiorari allows this Court to affirm that *Tohono* does not (and cannot) apply to claims in which a person vindicates a self-executing constitutional right.

There is a material difference between vindicating a constitutionally-established right and a claim to enforce a congressionally-created entitlement.

Resource Investment's appeal provides this Court opportunity to clarify that its holding in *Tohono* (which involved an action dependant upon a congressional waiver of sovereign immunity) cannot apply to the self-executing constitutional right to just compensation guaranteed by the Fifth Amendment.

The majority in *Tohono* described the category of actions to which its holding applied as those in which "Congress has permitted claims against the United States for monetary relief in the CFC," further noting that for these claims, "relief is available by grace and not by right." 131 S. Ct. at 1731 (quoting *Beers* v. *Arkansas*, 61 U.S. 527, 529 (1857) ("as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted")).

But Resource Investment's claim is very different. Resource Investment's claim for compensation was *not created* by Congress, but *arises directly* from the Fifth Amendment. Thus, the government's obligation to justly compensate Resource Investment is not "voluntary" and does not depend upon a separate congressional waiver of sovereign immunity.

III. Certiorari should be granted because Section 1500 raises a "substantial constitutional question."

Judge Taranto of the Federal Circuit observed, "A substantial constitutional question would be raised if federal statutes forced a claimant to choose between securing judicial just compensation for a taking of property and pursuing constitutional and other legal claims that challenge, and if successful could reverse, the underlying action alleged to constitute a taking." *Roca Solida*, 778 F.3d at 1360. Judge Taranto is not alone in his warning that Section 1500 invites serious constitutional concerns.

Among all the provisions in the United States Code Section 1500 is remarkable because it is almost *universally* reviled by members of this Court, lower federal courts, senators, law professors and academics. These authorities are united in their view that Section 1500 is "anachronistic," "unfair," "confusing," "irrational," "purposeless," "unjust," and "ill-conceived." Section 1500 creates a "trap for unwary" and "unsuspecting" citizens because it is a "badly drafted statute," "serves no useful purpose," and creates a "judicial quagmire" that is an "obstacle" to "meritorious claims against the federal government."[9]

The issue is not whether Section 1500 is a pointless dysfunctional statute that "wreaks havoc" and unjustly denies citizen's meritorious claims; everyone agrees Section 1500 does this. The only question is whether the Court or Congress should fix this constitutional

9. Quotations and authorities from Emily S. Bremer and Jonathan R. Siegel, *Clearing the Path to Justice: The Need to Reform 28 U.S.C. §1500*, 65 Ala. L. Rev. 1, 3, 37-38 (2013).

problem. Granting Resource Investment's petition for certiorari allows this Court to address this problem in that circumstance when Section 1500 purports to abrogate a person's Fifth Amendment right to be justly compensated.

This Court has previously declined to overturn Section 1500 outright preferring instead to defer to Congress the task of remedying the wrongs wrought by Section 1500. See *Keene Corp.* v. *United States*, 508 U.S. 200, 217 (1993). This Court should however clarify *Tohono's* application and hold Section 1500 cannot bar claims arising under self-executing provisions of our Constitution.

A. Section 1500 is a "judicial embarrassment, a monument to cynicism" and justifies the conclusion that "the law is an ass."[10]

A report prepared for the Administrative Conference for the United States notes:

> Section 1500 is unfair to plaintiffs suing the United States. The statute leads to dismissal of cases for reasons unrelated to their merits, while serving little valid purpose ***. The statute has been strongly criticized by judges, lawyers, and academics. It causes results that are unjust and irrational. It should be repealed.[11]

The report continues:

> Federal judges have characterized [Section

10. Bremer, *supra* n.8, at 3.

11. *Id.* at 4.

> 1500] as a "trap for the unwary" that has "outlived its purpose." They have characterized the dismissals Section 1500 compels as "neither fair nor rational" and have critiqued "the injustice that often results in the application of this outdated and ill-conceived statute." They have referred to Section 1500's "awkward formulation," calling it "a badly drafted statute," and suggested that it would be "salutary" to repeal or amend it. They have criticized the government for using the statute to lay traps for unsuspecting plaintiffs. One judge even remarked that the statute would justify the famous conclusion that "the law is an ass." Scholars have been equally critical of Section 1500, and have called for its repeal or reform since as early as 1967. And some members of Congress have tried to repeal the statute. These efforts apparently failed only because the repeal proposal was bundled with more controversial changes to the CFC's jurisdiction.[12]

The report notes "[g]overnment lawyers can and do give sustained attention to contriving technical ways to defeat plaintiffs *** who are often baffled by the technical complexities. *** [G]overnment counsel, driven by a lawyer's natural desire to win cases, persuade courts to create and maintain technical complexities, which they then use to win more cases."[13] Section 1500 has created

12. *Id.* at 6-7 (footnotes omitted).

13. *Id.* at 12 (quoting Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435, 440-41 (1962)).

a "jurisdictional quagmire [and] continues to wreak havoc ***. Few issues in Federal Circuit's contemporary jurisprudence have caused greater confusion for the bench and bar."[14]

Justice Stevens called for Congress to repeal Section 1500. The Senate Judiciary Committee found Section 1500 has caused "much wasteful litigation over [a] nonmeritorious issue."[15] The Committee concluded that eliminating Section 1500 would "significantly improve the administration of justice at the [CFC]" because "Section 1500 today serves no useful purpose and is a serious trap for the unsophisticated lawyer or plaintiff."[16] The Senate Judiciary Committee said Section 1500 is a purposeless anachronistic statute:

> [O]ver the last century the courts have adopted procedural rules and doctrines *** which render section 1500 obsolete. Since it has outlived its usefulness, and serves primarily as an obstacle

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14. Payson R. Peabody, *et al.*, *A Confederate Ghost that Haunts the Federal Courts: The Case for Repeal of 28 U.S.C. §1500*, Federal Circuit Bar Journal, Vol. 4, No. 2 (Summer 1994), pp. 96, 110. See also David Schwartz, *Section 1500 of the Judicial Code and Duplicative Suits against the Government and Its Agents*, Georgetown Law Journal, Vol. 55, No. 4 (March 1967), p. 599.

15. Senate Judiciary Committee Chairman Orrin Hatch (R. Ut.), 143 Cong. Rec. S10, 428-03 (Oct. 6, 1997) (advocating repeal of Section 1500). See also Senate Judiciary Committee Chairman Howell Heflin (D. La.), 139 Cong. Rec. S10, 383 (daily ed. Aug. 4, 1993).

16. Citing testimony of CFC Chief Judge Loren Smith, Hearings before the House Subcommittee on Immigration and Claims on H.R. 992, House Committee on the Judiciary, H. Rept. No. 105-424, H.R. 992, 105th Cong., 2d Sess., p. 11.

> to property rights claimants, the Committee believes that section 1500 should be repealed.[17]

Members of the Federal Circuit believe Section 1500 has "become a judicial embarrassment, a monument to cynicism, [and] 'is now so riddled with unsupportable loopholes that it has lost its predictability and people cannot rely on it to order their affairs.'"[18]

B. The government wrongly uses Section 1500 to deny meritorious claims against the federal government.

Section 1500 was never intended to prevent meritorious claims, yet the government uses Section 1500 to unjustly prevent individuals, businesses, and especially Indian tribes from vindicating otherwise meritorious claims. See*, e.g.*, *Dico, Inc.* v. *United States*, 48 F.3d 1199, 1204 (Fed. Cir. 1995) (denying compensation for environmental clean-up costs mandated by EPA); *Trusted Integration, Inc.* v. *United States*, 659 F.3d 1159, 1163-64 (Fed.Cir.2011) (denying compensation for mineral rights taken because mining was prohibited due to military bombing); *Central Pines Land Co.* v. *United States*, 687 F.3d 1360 (Fed. Cir. 2012), (denying compensation for mineral rights taken by the government).

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17. Senate Comm. on the Judiciary, S. Rept. No. 105-242, 105th Cong., 2d Sess., p. 17.

18. *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545, 1558 (Fed. Cir. 1994) (Mayer, J., dissenting); see also *Johns-Manville Corp.* v. *United States*, 855 F.2d 1556, 1568 (Fed. Cir. 1988).

C. When Section 1500 abrogates constitutionally-guaranteed rights this Court cannot avoid its duty to uphold the Constitution because it hopes Congress may someday repeal the offending statute.

When a statutory scheme prevents a person from vindicating his constitutionally-guaranteed right to be justly compensated this Court must act. While it may be possible for this Court to defer to Congress the job of fixing Section 1500 as applied to congressionally-created claims, this Court may not defer its duty to limit this statute when Section 1500 denies an owner's constitutional right to just compensation. Chief Justice Marshall explained this point:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Marbury, 5 U.S. at 177-78.

Monongahela arose when the United States used eminent domain to take locks and dams owned and built by Monongahela Company and also took Monongahela's franchisee to charge tolls for the use of the lock and dam. The United States argued that Congress, not the judiciary, could determine the amount of compensation the United States would pay for the property it had taken.

This Court rejected this notion and began by noting, "Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this fifth amendment, and can take only on payment of just compensation." *Monongahela*, 148 U.S. at 336.

Congress not only took Monongahela's property but Congress also wanted to say what "just compensation" it would pay Monongahela. This Court emphatically rejected that proposition:

> By this legislation congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of

> compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.
>
> *Monongahela*, 148 U.S. at 327.

Our Constitution does not grant Congress authority to take private property and, in derogation of the Fifth Amendment guarantee of "just compensation," adopt a statutory scheme that operates to deny an owner's ability to vindicate their right to be justly compensated.

CONCLUSION

The government used Section 1500 to deny Resource Investment the ability to vindicate its Fifth Amendment right to be justly compensated. This Court should grant certiorari and hold that neither Section 1500 nor this Court's decision in *Tohono* allow such an abrogation of constitutional protections.

Respectfully submitted,

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