No. _______

IN THE

Supreme Court of the United States

ERIKA BAILEY-JOHNSON,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In relevant part, 28 U.S.C. § 1500 states that "The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff … has pending in any other court … against the United States[.]" In *United States v. Tohono O'Odham Nation*, the Court held that "two suits are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit." 563 U.S. 307, 317 (2011). The question presented is:

> Should the Court revisit its holding in *Tohono* to determine whether, under 28 U.S.C. § 1500, a U.S. District Court action solely for injunctive or declaratory relief under the Administrative Procedure Act is "for or in respect" to a "claim" against the United States in the United States Court of Federal Claims for money damages?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

Petitioner Erika Bailey-Johnson is the daughter of the deceased original plaintiff Gary Bailey, and she is the owner of the subject property. The U.S. Court of Federal Claims substituted Ms. Bailey-Johnson as the plaintiff in this action on June 7, 2021.

RELATED PROCEEDINGS

Bailey v. U.S. Army Corps of Engineers, No. Civ. 02-639, 2003 WL 21877903 (D. Minn. Aug. 7, 2003.)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Erika Bailey-Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Federal Claims as summarily affirmed by the United States Court of Appeals for the Federal Circuit.

OPINIONS AND ORDERS BELOW

The United States Court of Appeals for the Federal Circuit's order for summary affirmance is not reported but is reprinted by Petitioner in the Appendix ("App.") at 1a. The United States Court of Federal Claims' judgment is reprinted by Petitioner at App.2a. The United States Court of Federal Claims' opinion is reported at 155 Fed.Cl. 166 and is reprinted by Petitioner at App.3a.

JURISDICTION

The United States Court of Appeals for the Federal Circuit issued its order on November 23, 2021. Pursuant to Rule 36(b) of the United States Court of Appeals for the Federal Circuit's Rule of Practice, the Federal Circuit did not issue a formal judgment and deems the order its judgment. The United States Court of Federal Claims issued its judgment on August 2, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In its entirety, 28 U.S.C. § 1500 provides:

> 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.

STATEMENT OF THE CASE

In 1989, Petitioner's father, Gary Bailey, purchased a plot of land in Lake of the Woods County, Minnesota. *Bailey v. United States*, 78 Fed.Cl. 239, 241 (2007). In 1998, while endeavoring to develop this land, Mr. Bailey applied for an after-the-fact Clean Water Act ("CWA") Section 404 permit from the United States Army Corps of Engineers ("Corps"). *Id.* at 242-43. In 2001, the Corps denied Mr. Bailey's permit application. *Id.* The Corps also issued Mr. Bailey a restoration order related to work already performed. *Id.* at 244.

In December 2001, Mr. Bailey administratively appealed the Corps' decision denying his Section 404 permit application and the restoration order. *Bailey v. U.S. Army Corps of Engineers*, No. Civ. 02-639, 2002 WL 31728947 at *6 (D. Minn. Nov. 21, 2002). The Corps upheld its decision in January 2002. *Id.*

In March 2002, Mr. Bailey filed a lawsuit against the Corps in the United States District Court for the District of Minnesota. *Id.* at *1. Relevant to this petition, Mr. Bailey sought an order (a) declaring that the Corps' decision to deny his Section 404 permit was invalid, (b) permanently enjoining the Corps from enforcing the restoration order, and (c) declaring that the Corps violated Executive Order 12630 related to the evaluation of a potential Fifth Amendment takings. *See id.* at *6-8.

In November 2002, through the Corps' motion under Fed. R. Civ. P. 12(b)(1), the district court dismissed

Mr. Bailey's claims related to the restoration order and Executive Order 12630. *Id.* at *6. With the former, the court held that the enforcement order was not reviewable because the Corps had not yet sought to enforce it. *Id.* at *7. With the latter, the court held that Mr. Bailey did not have a private right of action under Executive Order 12630to seek a declaration related to its enforcement. *Id.* at *8.

In August 2003, through the Corps' motion under Fed. R. Civ. P. 56, the district court dismissed Mr. Bailey's remaining claim against the Corps related to its denial of his Section 404 permit. *Bailey v. U.S. Army Corps of Engineers*, No. Civ. 02-639, 2003 WL 21877903, at *5 (D. Minn. Aug. 7, 2003).

In the meantime, on August 29, 2002, while seeking declaratory and injunctive relief in the district court under the Administrative Procedures Act ("APA"), 5 U.S.C. ch. 5, subch. I § 500 *et seq*., Mr. Bailey commenced the underlying action in the United States Court of Federal Claims. *Bailey*, 78 Fed.Cl. at 245. Mr. Bailey alleged that the Corps' restrictions constituted a taking under the Fifth Amendment of the United States Constitution and thus asserted that he was entitled to just compensation. *Id.*

Fourteen years later, in 2016, following the Court's decision in *United States v. Tohono O'Odham Nation*, 563 U.S. 307 (2011) and the Federal Circuit's decision applying *Tohono* in *Resource Investments, Inc. v. United States*, 785 F.3d 660 (Fed. Cir. 2015), *cert. denied* 136 S.Ct. 2506 (2016), the United States moved to dismiss Mr. Bailey's complaint under 28 U.S.C. §

1500. *Bailey-Johnson v. United States*, 155 Fed. Cl. 166, 167 (2021); App.7a.

Four years later, on March 23, 2020, while this motion was pending, Mr. Bailey passed away. By motion, the court substituted his daughter—the Petitioner—as the plaintiff. App.6a. On July 30, 2021, the court granted the United States' motion to dismiss under 28 U.S.C. § 1500. *Id.* at 169; App.10a. The clerk of court entered judgment on August 2, 2021. App.3a.

Recognizing that this Court's broad language in *Tohono* dictated an unfavorable outcome to her appeal, Petitioner moved the Federal Circuit for a summary affirmance of the Claims Court's summary judgment order. App.2a. The Federal Circuit granted Petitioner's motion on November 23, 2021. *Id.*

REASONS FOR GRANTING THE PETITION

The Court in *Tohono* properly discarded the rule that § 1500 applies only when the corresponding suits "seek overlapping relief." *Tohono*, 563 U.S. at 310. The Court instead developed an analysis that focuses on "sufficient factual overlap," which better addresses § 1500 within the context of the Court of Federal Claim's limited jurisdiction and Congress's desire to prevent duplicative claims. *See Tohono*, 563 U.S. at 314-17; *accord Keene Corp. v. United States*, 508 U.S. 200, 206 (1993). But *Tohono*'s broad holding altogether disregarding "the relief sought" created a new fact-based test that (a) strays from the text of § 1500, and (b) spawned diverging tests in lower courts that go even further beyond the text.

Beginning with the text of § 1500, the phrase "any claim for or in respect to which the plaintiff … has pending in any other court" in § 1500 places the term "claim" at the center of the inquiry. And within the

context of the Court of Federal Claims jurisdiction, particularly in 1868 (when the court was called just the "Claims Court"), "claim" means an action for monetary relief or compensation. In turn, this language reflects Congress' desire to prevent duplicative *monetary* claims against the United States or its agents. Alternatively, through § 1500, Congress intentionally stripped the Claims Court's jurisdiction when the claimant has a prior action for declaratory or injunctive relief against the United States or its agents, suits that by their very nature cannot be duplicative because the Claims Court had (and still has) no jurisdiction to hear them. The Court should grant this petition to address this language under new facts.

Certiorari is also appropriate because *Tohono*'s fact-based holding has spawned diverging tests from the Federal Circuit. One line of cases applies an "operative facts" test, which compares the allegations found in the complaints to assess similarity. *See, e.g., Petro-Hunt, L.L.C. v. United States*, 862 F.3d 1370, 1381-83 (Fed. Cir. 2017). Another line of cases adopts a "res judicata test," a convoluted inquiry that touches on the Court's reasoning in *Tohono*, but ignores its holding and, as importantly, § 1500's clear language. *See, e.g., Resource Investments,* 785 F.3d at 664-67. In turn, the Court of Federal Claims juggles between these tests to arrive at decisions that further stray from the statute's objective to preclude "duplicate lawsuits." *Tohono*, 563 U.S. at 311.

To be clear, Petitioner is not asking the Court to overturn *Tohono*. She instead asks that, with new facts before it, the Court revisit and narrow the *Tohono* rule to better align it with the text of § 1500. In summary, the facts in this case highlight important

issues of federal law because, unlike the plaintiff/respondent in *Tohono*, Mr. Bailey did not seek monetary relief (e.g., an accounting) from the United States in the district court. *Tohono*, 563 U.S. at 310. He instead sought only injunctive and declaratory relief, actions not allowed in the Court of Federal Claims. Thus, there was no "pending" claim in the district court that Mr. Bailey's "claim" in the Court of Federal Claims could have been "for or in respect to." *See* 28 U.S.C. § 1500.

I. HOW TO INTERPRET THE TEXT OF § 1500 IS AN IMPORTANT QUESTION OF FEDERAL LAW.

This facts in this case present an important question of statutory interpretation that *Tohono* did not specifically address: does the Court of Federal Claims lose jurisdiction over a claim for monetary relief when only a claim for injunctive or declaratory relief is brought in district court on substantially the same operative facts? In fact, the concurrence in *Tohono* raised this exact crucial distinction, warning the majority that its sweeping judgment could negatively affect future litigants that only sought injunctive or declaratory relief in district court. *See Tohono*, 563 U.S. at 318-330 (Sotomayor J., concurring). The Court should now address this question within the "text, purpose, and history of § 1500," *id.* at 324, an exercise that will demonstrate Congress's intent to provide jurisdiction to the Court of Federal Claims for *monetary* claims *unless* that same plaintiff, raising substantially the same operative facts, has already sought *monetary* relief

against the United States, in one form or another, in another court.

Again, in full, § 1500 provides the following:

> The United States Court of Federal Claims shall not have jurisdiction of *any* <u>*claim for or in respect to which*</u> *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.

28 U.S.C. § 1500 (emphases added). In *Tohono*, the Court abbreviated § 1500 to mean that the Court of Federal Claims "has no jurisdiction over a claim if the plaintiff has another *suit* for or in respect to that claim pending against the United States or its agents." *Tohono*, 563 U.S. at 311 (emphasis added). This summary is, while generally correct, unhelpful because "suit" is not the relevant inquiry. More narrowly, as written, § 1500 "requires a comparison between the *claims* raised in the Court of Federal Claims and in another lawsuit." *Keene*, 508 U.S. at 210 (emphasis added). Thus, textually, the term "claim," not "suit," should drive the relevant analysis, and specifically whether a prior claim is "for or in respect to" the "claim" in the Court of Federal Claims.

The term "claim" and its associated "for or in respect to" clause should be interpreted in "context and with a view to their place in the overall statutory scheme." *Gundy v. United States*, 139 S.Ct. 2116, 2126 (2019). The Court also recognizes that "history and purpose" can "divine the meaning of language," *id.*, and further

that the Court interprets text "consistent with [its] ordinary meaning at the time Congress enacted the statute." *Wisconsin Central Ltd. v. United States*, 138 S.Ct. 2067, 2070 (2018) (cleaned up). Putting these principles together, the relevant meanings of "claim" and "for or in respect to" become clear.

Section 1500 is a jurisdictional statute. Congress passed it in conjunction with others—both before and after 1868—to delineate the scope of the Claims Court's jurisdiction. *Keene*, 508 U.S. at 219 ("Section 1500 … takes away jurisdiction even though the subject matter of the suit may appropriately be before the Claims Court.") (Stevens J., dissenting). As an Article I tribunal, the Court of Federal Claim's "jurisdiction is confined to the rendition of *money* judgments in suits brought for that relief against the United States." *United States v. Sherwood*, 312 U.S. 584, 588 (1941) (emphasis added). Conversely, the Court of Federal Claims "has no power to grant equitable relief." *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988). Thus, in full context, any reference to a "claim" in this jurisdictional statute necessarily relates to money judgments.

The history behind § 1500 further demonstrates this limited meaning. In 1855, just thirteen years before Congress passed what became § 1500, it created the Claims Court "to open a judicial avenue for certain monetary claims against the United States." *United States v. Bormes*, 568 U.S. 6, 11 (2012). This relieved the increasing burden from claimants petitioning "Congress for private bills to recover money owed by the Federal Government." *Id.* Shortly thereafter, in 1863, just five years before a predecessor to § 1500 became law, Congress passed new legislation that "empowered the [Claims Court] to enter final judgments."

Id.; see also United States v. Mitchell, 463 U.S. 206, 213 (1983).

This history clarifies that the "claims" that are subject to "comparison" under § 1500, *Keene*, 508 U.S. at 210, are claims for monetary relief. Through its language in § 1500, Congress in 1868 sought to roll back its jurisdictional grant to the Claims Court, barring access to that forum when a party had already sought "compensation" from the Unites States' agents in "separate suits in other courts," such as through "tort theories such as conversion." *Keene*, 508 U.S. at 206. In other words, multiplate claims for monetary relief constitute the "duplicate lawsuits" that § 1500 sought "to curb." *Tohono*, 563 U.S. at 311. Strictly constructing § 1500, to be "for or in respect to" any "money claims against the United States," *Bormes*, 568 U.S. at 11, the pending claim in the federal district court must also seek monetary relief—in one form or another.

In summary, the Court should address this important question of statutory interpretation. Building on *Tohono*, the Court should, pursuant to a strictly textualist interpretation of § 1500, curb that broad holding and construe § 1500 to mean that it precludes jurisdiction in the Court of Federal Claims only if the plaintiff has another pending claim against the United States or its agents for *monetary* relief, under any cognizable legal theory, that is based on substan-

tially the same operative facts. This modification embraces *Tohono*'s fact-based inquiry while better aligning the rule with the text and meaning behind § 1500.

II. THE COURT SHOULD ADDRESS THE DIVERGING RULES CREATED BY LOWER COURTS.

This case also presents the Court an opportunity to correct the diverging and erroneous precedents that *Tohono* spawned in the Federal Circuit. While one line of cases faithfully applies the Court's "substantially the same operative facts" holding, *see, e.g., Petro-Hunt*, 862 F.3d at 1381-83 (Fed. Cir. 2017) (citing *Central Pines Land Co. L.L.C. v. United States*, 697 F.3d 1360, 1364-67 (Fed. Cir. 2012)), another line adopted a complicated "res judicata test" that corrupts the Court's reasoning in *Tohono*. *See, e.g., Acetris Health, LLC v. United States*, 949 F.3d 719, 728-30 (Fed. Cir. 2020) (citing *Resource Investments*, 785 F.3d at 666 and *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163-70 (Fed Cir. 2011)); *Resource Investments*, 785 F.3d at 664-67 (citing *Trusted Integration*, 659 F.3d at 1164).

In *Tohono*, the Court reasoned that Congress enacted "the jurisdictional bar in § 1500 … in part to address the problem that judgments in suits against officers were *not* preclusive in suits against the United States." *Tohono*, 563 U.S. at 315 (emphasis added) (citing *Matson Nav. Co. v. United States*, 284 U.S. 352, 355-56 (1932) ("But the declared purpose of [§ 1500] was only to require an election between a suit in the Court of Claims and one brought in another court against an agent of the government, in which the judgment would *not* be res adjudicata in the suit pending in the Court of Claim.") (emphasis added)). In turn,

understanding that § 1500 is a *substitute* for res judicata, the Court reasoned that it should "operate in the same fashion," which means focusing on "factual overlap" rather than overlapping relief. *Tohono*, 563 U.S. at 315.

Some Federal Circuit decisions have derogated this guidance into a rule bearing little resemblance to *Tohono* or § 1500. In *Resource Investments*, the court reasoned that factual overlap turns on "whether the second Claims Court takings suit would have been barred by res judicata if it had been brought in a district court." *Resource Investments*, 785 F.3d at 666. That impossible premise did not dissuade the court from engaging in a long and complex res judicata analysis, which included deciding whether the "act or contract test" or the "transactional test" should apply—the court uses them both—and seeking to invoke a historical res judicata analysis from 1868. *Id.* at 666-68. The court ultimately held that § 1500 precluded jurisdiction. *Id.* at 668.

In *Acetris Health*, the Federal Circuit quoted the so-called res judicata test from *Resource Investments*, but this time evaluated § 1500 jurisdiction under the "act or contract test" and the "evidence test." *Acetris Health*, 949 F.3d at 729-30. Missing from the court's analysis was any comparison of the allegations in each complaint and, specifically, whether the plaintiff pleaded the same operative facts under different legal theories. *See id.* This time the court held that § 1500 did not preclude jurisdiction. *Id.* at 668.

The line of Federal Circuit precedent reflected in *Resource Investments* and *Acetris Health* misapplies *Tohono* and § 1500. First, fundamentally, it ignores that res judicata would *not* have applied in 1868 for the claims that Congress sought to preclude through

the language in § 1500. *Tohono*, 563 U.S. at 315. Thus, strict application of res judicata principles—from any era—turns the purpose of § 1500 on its head. Second, the Court in *Tohono* did not apply a "res judicata test" at all. Instead, the Court merely compared relevant allegations, concluding that "it appears that the [plaintiff] could have filed two identical complaints, save the caption and prayer for relief, without changing either suit in any significant respect." *Tohono*, 563 U.S. at 318.

As noted, the competing line of Federal Circuit precedent correctly applies *Tohono*'s test, meaning a comparative analysis of factual allegations underlying the alternative legal theories brought in each action. *Petro-Hunt*, 862 F.3d at 1382 ("To determine whether the § 1500 bar attached when plaintiffs filed their action in the Court of Federal Claims, we compare the operative facts underlying the claims pending in the two courts.") (citing *Central Pines*, 697 F.3d at 1364). In summary, as the law stands, jurisdiction under § 1500 depends not on the clear rule established by this Court, but on the whims of a particular judge or panel, and specifically what rule they choose to adopt.

In this case, the lower court notably did not apply either rule. *See* App.7a-9a. In fact, the court also seemingly invoked an understanding of § 1500 consistent with Petitioner's argument that there must be corresponding claims for monetary relief, which the court somehow found through a misguided and unenforceable declaratory action regarding an executive order. *See* App.8a-9a. The court's error only highlights existing problems with § 1500 precedent, including the disconnect between what § 1500 says and how courts are asked to evaluate different claims. To be clear, Petitioner could have appealed the lower court's decision

because it wrongly evaluated legal theories rather than operative facts. But Petitioner understood that, in correcting that error, the Federal Circuit nonetheless must still apply *Tohono*, which dictated an unfavorable outcome because the operative facts underlying Petitioner's APA claims necessarily mirror those in the latter takings claim.

In summary, Petitioner asks the Court to revisit *Tohono* on the new factual distinction that Petitioner's claim in the district court did not allege any cognizable claims for monetary relief. In addition to presenting the Court an opportunity to narrowly construe the text of § 1500, it also presents it the chance to address diverging and problematic precedent in the lower courts under § 1500, which would benefit all future litigants.

III. FUNDAMENTAL FAIRNESS COMPELS REVISITING *TOHONO*.

The final reason the Court should grant this petition is because the Court decided *Tohono* almost ten years after Petitioner's deceased father filed the relevant actions. When Mr. Bailey elected to bring claims for injunctive relief in the district court under the APA, followed by a takings claim in the Court of Federal Claims for monetary relief under the same operative facts, controlling precedent unequivocally provided him this straightforward two-step option. *See Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994) (holding in a case with near identical facts—including a § 404 permit under the CWA—that § 1500 precludes jurisdiction only when the corresponding claims allege the same operative facts *and*

the same relief). Nobody can fault Mr. Bailey for electing to first sue for injunctive relief under the APA in December 2001.

Petitioner concedes that § 1500 is jurisdictional and thus issues of fairness or equity cannot constitute the basis for an exception. But with other independent bases for granting certiorari existing, fairness promotes the need to reevaluate the Court's reading of a jurisdictional statute, and particularly when controlling precedent broadly interpreted that statute beyond existing facts. Petitioner asks the Court to revisit *Tohono* for the limited purpose of interpreting § 1500 in the context of facts that *Tohono* did not already address. Nothing less than Petitioner's Fifth Amendment property right hangs in the balance.

CONCLUSION

The Court in *Tohono* correctly reasoned that § 1500 requires a focus on "operative facts," rather than merely seeking to identify identical claims and legal theories. *Tohono*, 563 U.S. at 310. But by reading into the statute a phrase that does not exist: "regardless of the relief sought in each suit" in its holding, *id.* at 317, the Court transformed an instructive analysis of § 1500 into an ironclad rule that, under different facts, would disregard the plain meaning of "claim" and "for or in respect to." These facts are now before the Court. Applying § 1500, this case highlights the distinction between a "claim" for purely injunctive or declaratory relief in the district court, and a "claim" for monetary relief in the Court of Federal Claims. This Court should grant this petition and address this important question of federal law.

Respectfully submitted,

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