No. 11-597

In the Supreme Court of the United States

ARKANSAS GAME & FISH COMMISSION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Petitioner Arkansas Game & Fish Commission, a constitutional entity of the State of Arkansas, sought just compensation from the United States under the Takings Clause of the Fifth Amendment for physically taking its bottomland hardwood timber through six consecutive years of protested flooding during the sensitive growing season. The Court of Federal Claims awarded $5.7 million, finding that the Army Corps of Engineers' actions foreseeably destroyed and degraded more than 18 million board feet of timber, left habitat unable to regenerate, and preempted Petitioner's use and enjoyment. The Federal Circuit, with its unique jurisdiction over takings claims, reversed the trial judgment on a single point of law. Contrary to this Court's precedent, a sharply divided 2-1 panel ruled that the United States did not inflict a taking because its actions were not permanent and the flooding eventually stopped. The Federal Circuit denied rehearing *en banc* in a fractured 7-4 vote. The question presented is:

> Whether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the Takings Clause.

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JURISDICTION

The Federal Circuit rendered its decision on March 30, 2011. On May 13, 2011, the Arkansas Game and Fish Commission petitioned for rehearing *en banc*. The Federal Circuit denied panel rehearing and rehearing *en banc* on August 11, 2011. A timely petition for a writ of certiorari was filed on November 9, 2011. This Court granted the petition on April 2, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of Amendment 35 to the Constitution of the State of Arkansas states: "The control, management, restoration, conservation and regulation of birds, fish, game and wildlife resources of the State, including hatcheries, sanctuaries, refuges, reservations and all property now owned, or used for

said purposes and the acquisition and establishment of same, the administration of the laws now and/or hereafter pertaining thereto, shall be vested in a Commission to be known as the Arkansas State Game and Fish Commission, to consist of eight members. Seven of whom shall be active and one an associate member who shall be the Head of the Department of Zoology at the University of Arkansas, without voting power."

A relevant portion of the Flood Control Act of 1928, as codified at 33 U.S.C. § 702c, is reproduced at Pet. App. 182a.

33 C.F.R. 211.1 states: "The term *real estate* as used in this part includes land; buildings; piers and wharves; office and storage space; rights-of-way or easements, whether temporary or permanent; and any interests which may be acquired or held therein for the use or benefit of the United States by the Department of the Army or any branch thereof."

STATEMENT OF THE CASE

Since the 1950s, the Arkansas Game and Fish Commission ("Commission") has operated and maintained the Dave Donaldson Black River Wildlife Management Area ("Management Area")—one of the largest contiguous areas of bottomland hardwood forest in the Upper Mississippi Alluvial Valley—in an effort to preserve unique habitat for migratory birds and other wildlife. From 1993 to 2000, the United States Army Corps of Engineers ("Corps") deviated from its approved 1953 Clearwater Lake Water Control Manual for releases into the Black River at its upstream Clearwater Dam. The deviations caused six

consecutive years of flooding across large sections of the 23,000-acre Management Area, killing or degrading nearly 18 million board feet of timber. This devastation has continued to impede the Commission's ability to operate the Management Area for the conservation and recreational purposes it was intended to serve. According to a majority of the Federal Circuit, the United States need not pay just compensation to the Commission for the destruction it caused.

The Federal Circuit's divided decision (2-1) reverses a 61-page trial opinion by the Court of Federal Claims (Judge Charles F. Lettow) that considered the substantiality and foreseeability of the flooding on the Management Area as well as other relevant factors before awarding the Commission approximately $5.6 million for the timber taken by the Corps, plus an additional $176,428.34 for regeneration of forest habitat. The Federal Circuit's reversal conversely focuses on a single factor: the temporary nature of the Corps' flooding actions. The Federal Circuit perceives a categorical rule that temporary government action can never be a taking if the government does not intend to create a permanent flooding condition. This rule, which dissenters described as a "rigid, unworkable, and inappropriate black letter rule" that "contradicts the entire body of precedent relating to the application of the Fifth Amendment to government-induced flooding," remains undisturbed following the Federal Circuit's splintered (7-4) denial of rehearing and rehearing *en banc*. *See* Pet. App. 37a (Newman, J., dissenting), 176a (Moore, J., et al., dissenting from denial of rehearing). This Court should reject it and reaffirm that temporary flooding can constitute a taking.

A. The Black River Wildlife Management Area

The Arkansas Game and Fish Commission was created by Amendment 35 to the Arkansas Constitution, which vests it with responsibility and authority for "[t]he control, management, restoration, conservation and regulation of birds, fish, game and wildlife resources of the State . . . ." Ark. Const. amend. 35. The Commission fulfills this responsibility, in part, through the purchase and establishment of wildlife management areas throughout the State of Arkansas. The Commission operates its wildlife management areas, often the last remaining forests in many regions of the state, with the goal of preserving habitat for various indigenous and migratory species while maintaining wildlife at healthy and sustainable levels. These areas also provide public recreational opportunities.

Purchased by the Commission in the 1950s and 1960s, the Dave Donaldson Black River Wildlife Management Area contains roughly 23,000 acres and is located along 25 miles of the Black River in northeast Arkansas. J.A. 478, 732 ¶4. It and adjacent privately-owned property form one of the largest contiguous segments of bottomland hardwood forest remaining in any floodplain in the Mississippi Alluvial Valley. J.A. 437. The diverse hardwood timber species found in this forest community—including nuttall, overcup, and willow oaks—support one of the richest communities of fish, amphibian, reptile, bird, and mammal species in North America. J.A. 456; *see also* J.A. 382-84, 416. In particular, the Management Area has been identified as critical wintering habitat for migratory waterfowl that pass through on the

Mississippi River flyway and for many state- and federally-listed threatened and endangered species of plants and animals. J.A. 435, 437.

In pursuit of its state constitutional charge, the Commission developed several greentree reservoirs ("GTRs") on the Management Area. Since the 1960s, GTRs have been flooded annually from mid-November through January when the trees are dormant to provide cover and food for migratory waterfowl during the winter months and a public hunting area for sportsmen. Impounded water is released after the major waterfowl migration ends and typically drains from the GTRs by the end of February. The Commission also periodically inventories forested areas to monitor species composition, stand structure and stocking, and the vigor of the forest. The Commission develops management plans that include systematic harvesting of mature oaks and thinning and regeneration cuts to promote improved and continued habitat.

These practices have allowed the Management Area to thrive and have established it as both a premier duck hunting area and a popular location for birdwatching, fishing, and other types of hunting. The Commission's regional wildlife supervisor described the general condition of the forest when he began working for the Commission in 1978 as "great." J.A. 53. He observed no obvious problems with the forest's health and heard no report of such problems. J.A. 53-54. The Commission's regional habitat biologist, who is a registered forester, agreed that he was "amazed" by the Management Area in the early 1980s. J.A. 82. He "had never seen that much large nuttall oak in one location before" and was impressed with the health

and obvious growth of the trees. J.A. 82. Aerial photos taken in the mid-1980s confirm the uniformity and smoothness of the forest canopy. J.A. 487. In the early 1990s, the Management Area continued to be "the most beautiful intact bottomland hardwood forest" that one Commission forest manager had ever seen. J.A. 74.

B. The Corps of Engineers' Deviations from the Authorized Clearwater Lake Water Control Manual

Clearwater Lake and Dam is located in southeastern Missouri upstream from the Management Area and approximately 32 miles northwest of Poplar Bluff, Missouri. The Corps has managed controlled releases of water from the dam since construction was completed in 1948. J.A. 732-33 ¶¶5, 9. The Clearwater Lake Water Control Manual was issued by the Corps in 1953 to govern those releases. J.A. 733 ¶¶11-12. Per the manual's plan, water was released in short, high discharge pulses in late winter and early spring resulting in short-term overbank flooding along the lower Black River in southern Missouri and northeast Arkansas. *See* J.A. 504-30. The Corps generally followed this procedure for forty years. *See* J.A. 379. As a result, floodwaters typically receded before the end of May of each year, and the hardwood timber growing on the Management Area thrived. J.A. 379. From 1993 to 2000, however, the Corps implemented a series of deviations from the authorized plan. J.A. 734 ¶15; *see also* Pet. App. 47a-48a.

The Corps initially only requested a deviation for the fall and winter of 1993 to benefit upstream farmers

and reduce flooding on their properties. Pet. App. 6a; *see also* Jt. Exh. 205, Tr. 364, 368; Jt. Exh 206, Tr. 364, 368. In the same year, it facilitated formation of the White River Ad Hoc Work Group, which was composed of a variety of stakeholders having land interests along the White and Black Rivers, and asked the group to propose permanent changes to the approved plan. Pet. App. 6a. Because the work group could not reach a consensus on a permanent deviation plan, the Corps continued to impose a series of deviations. Pet. App. 8a. The Corps promoted formation of a work group subcommittee of only Black River interests in 1996, but that subcommittee also failed to garner unanimous approval for any permanent deviation plan. Pet. App. 8a, 50a. Meanwhile, the Corps continued to deviate from the authorized water control plan. *See* Pet. App. 48a; J.A. 349 (1999 memo noting that "the lake has been operating under an authorized deviation, as nearly as can be determined, since 1993"). In 1999, it finally began a formal process for adopting its deviations as a permanent revision to the Clearwater Lake Water Control Manual. Pet. App. 9a, 51a; J.A. 58-59, 350.

The Court of Federal Claims described the Corps' actions during this period as a "series of deviations" that resulted in a unique "pattern" of increased flooding on the Management Area. Pet. App. 48a, 107a; *see also* Pet. App. 89a (explaining that the deviations were not "isolated invasions that might merely constitute a tort"). Although lower in volume, the releases from Clearwater Dam under each of the deviations were more sustained and occurred throughout the spring and summer. J.A. 438-39. Compared to the approved water control plan, they caused higher water levels for longer durations in the

river below Poplar Bluff and six consecutive years of prolonged flooding on the Management Area during the critical growing seasons. J.A. 439; *see also* Pet. App. 14a ("With respect to the substantiality of the flooding, the Commission's testimony showed that the Management Area flooded regularly during the 1993-2000 period, including during the tree growing season."); J.A. 83-84. In each year of increased flooding, bottomland hardwood soil remained saturated throughout much of the year. J.A. 439. These conditions ultimately resulted in extensive destruction of the Commission's timber on the Management Area and severely degraded the natural bottomland hardwood habitat. J.A. 376-77, 381-87, 439; *see also infra* at 10-15 (describing biological process and extent of damage).

In 2001, the Corps finally ceased its deviations and abandoned its efforts to permanently alter the water control plan, but only after—at the Commission's insistence—the Corps had performed water stage testing in the Black River in the vicinity of the Management Area. *See* Pet. App. 15a-16a. The Commission and other interest groups, including the United States Fish and Wildlife Service, the Missouri Department of Conservation, dock owners and campsite operators at Clearwater Lake, and drainage district members, had previously expressed numerous, strong objections to the Corps' deviations. J.A. 59-62. The Commission had complained repeatedly to the Corps that the Management Area was experiencing sustained flooding during the growing season due to the Corps' deviations. J.A. 60-62, 399-407; *see also* Pet. App. 7a, 15a, 49a, 98-99a. The Commission specifically forewarned that the deviations would be detrimental to the biological integrity of the area

because sustained, growing season flooding is extremely harmful to bottomland oak species such as nuttall, willow, and overcup oak. J.A. 404-11. It characterized the new flooding regime as "clearly unacceptable to our management goals" and urged the Corps to return to the original water control plan. J.A. 415; *see also* Pet. App. 50a. The other groups voiced similar concerns about the welfare of the bottomland hardwood forest in the Management Area being affected by the flooding. *See, e.g.*, J.A. 63-66. Even more urgent objections were provoked from the Commission and other interested parties after the Corps moved forward with adopting permanent revisions to the Clearwater Lake Water Control Manual and issued a draft environmental assessment finding that the flooding had "no significant impact" on the Management Area. *See* J.A. 71-72, 348-60; *see also* Pet. App. 51a-52a.

Only the water-stage testing finally performed in 2001 convinced the Corps that its deviations had a "clear potential for damage" to bottomland hardwoods in the Management Area. Pet. App. 15a-16a. The Corps issued a revised environmental site assessment at that time, admitting that its temporary flooding regime had "the potential for significant impacts on the natural or cultural resources present" and that "extended inundation could result in adverse impacts to species composition and habitat deterioration." J.A. 726. Colonel Thomas Holden (United States Army Corps of Engineers, Little Rock District) acknowledged that the Commission's objections had been valid and advised that "anyone could challenge us in that [the] deviations are not in compliance with [the National Environmental Policy Act of 1969] and enjoin us.

Blissful ignorance of the preceding 25+ years no longer applies." Pet. App. 186a, 188a.

C. The Substantial Damage Caused by the Corps of Engineers' Deviations

Bottomland hardwood forest ecosystems are accustomed to wintertime flooding when the water is cold and well-oxygenated. J.A. 111. However, if the flooding regimes are altered, these communities will shift to either a wetter or drier type tree species composition. J.A. 454. In particular, prolonged flooding and soil saturation during the growing season will cause less water-tolerant species, such as various oaks, to die and be replaced by more water-tolerant species. J.A. 454, 456. In some low elevation sites, communities can shift entirely from bottomland hardwood forest to a "swamp condition" characterized by invasive wetland species, like buttonbush, smartweed, lizard tail, cypress seedlings, and black willow, that prevent oak regeneration. J.A. 100-01, 113-14. This occurs because bottomland hardwood timber cannot effectively metabolize sugars if subjected to consecutive years of summertime flooding.

Through the process of photosynthesis, trees are able to extract carbon dioxide from the atmosphere and use solar energy to convert it into carbohydrates or sugars. J.A. 109-10. Respiration—the reverse chemical process—requires oxygen to convert the sugars back into carbon dioxide and water which releases stored chemical energy. J.A. 110. This energy is required for metabolic processes in the trees, including photosynthesis, transpiration, respiration, and growth. J.A. 112. If flooding occurs during the hot summer months, the dissolved oxygen in saturated

soils escapes into the atmosphere. J.A. 111-12. At a certain level, the loss of oxygen from the water and soil medium will force trees to switch to anaerobic respiration to survive. J.A. 112. Toxic chemicals produced as byproducts of anaerobic respiration can kill the fine tree roots where carbohydrates are stored and cause drastic reduction of tree root mass over time. J.A. 110. Root system loss combined with a lack of adequate energy production can ultimately result in tree death. J.A. 112.

The timber species found in bottomland hardwood forests cannot tolerate multiple successive years of anaerobic conditions. J.A. 110-11. For example, nuttall oaks may be able to survive flooding during a single growing season, but not over the course of three or more growing seasons. J.A. 112. Similarly, overcup oaks cannot tolerate four or five years of anaerobic conditions. J.A. 112-113. The United States' bottomland hardwood expert, Dr. Sammy King ("Dr. King"), agreed that the cumulative impacts of multiple years of growing season flooding can result in the death of nuttall and overcup oaks. J.A. 331-32. In contrast, wetland species like buttonbush, lizard tail, and smartweed have special metabolic pathways that allow them to thrive in such conditions. J.A. 111.

The Corps' deviations resulted in multiple consecutive years of what Dr. King characterized as "extreme" flooding because it lasted longer than was contemplated under the original water control plan and occurred during some of the hottest months. J.A. 338-42. Actual observed data demonstrated that there was a very significant and unique change in the number of days that the Black River was above levels that would cause flooding on the Management Area.

J.A. 121-24, 174, 425-33, 449-51, 467-75, 479-80; *see also* Pet. App. 88a-89a ("Water-level gauge data from Corning, located just upstream of the Management Area, provide explicit evidence in this regard."); Pet. App. 105a-114a (finding the Commission's data "reliable evidence" that the Management Area begins to flood when the Corning gauge reaches 4.5 to 5 feet and that extensive flooding occurs when it reaches 6 feet and rejecting the government's modeling as "far from unassailable" and as relying on a "faulty assumption" regarding drainage levels). Floodwaters often could not drain from oak stands until mid- to late-August. J.A. 379, 472-73; *see also* Pet. App. 89a; J.A. 83-84. As a result, soils on much of the Management Area remained saturated for 10 to 11 months of the year—and, most importantly, for the six-month growing season from April through September. J.A. 379, 473. However, there was no statistical difference in precipitation data between the pre- and post-deviation periods. J.A. 124, 178-80.

As described by Dr. King, the flooding on the Management Area took place during some of the hottest months of the year and led to increased tree stress because of reduced oxygen. J.A. 342. He agreed that this flooding followed by a drought period that occurred in 2000 caused timber mortality on the Management Area. J.A. 343; *see also* Pet. App. 14a, 122a-126a; J.A. 115-16. A wet period followed by drought can lead to acute mortality because the trees have lost many of their smaller feeder roots and simply can no longer absorb the resources necessary to sustain themselves during the drought. J.A. 332-33; *see also* Tr. 2443-2444 (explaining that the drought itself was only "moderate" and would not have killed the trees if they had not been subjected to flooding

from the deviations, as demonstrated by control stands not subject to the Corps' flooding that survived the drought).

Dr. Mickey Heitmeyer, an expert in bottomland hardwood ecology, explained that the type and level of flooding that plagued the Management Area from 1993 to 2000 was "a unique event that had never happened before." J.A. 174-75; *see also* J.A. 83-84. Illustrating the importance of this distinction and its correlation to the extensive timber death and destruction experienced on the Management Area following the Corps' deviations, he expounded that bottomland hardwood forest "is not adapted to six consecutive years of prolonged flooding. It is adapted to periodic flooding. It is adapted to annual flooding at certain times. It is adapted on occasion to growing-season flooding. But it is not adapted to six consecutive years of this level of flooding." J.A. 175.

Prior to when the Corps began deviating from the approved water control plan in 1993, the Management Area was fairly typical riverine, bottomland hardwood forest occupied by nuttall and overcup oaks that were mostly between 70 and 100 years old. J.A. 113. In "stark contrast" to this "beautiful," "stunning," and "healthy" forest, many trees in the Management Area were "browned-out" and appeared dead by 1999. J.A. 73-75, 97-98; *compare* J.A. 487 (1983 aerial photograph) *with* J.A. 347 (2000 aerial photograph); *see also* Pet. App. 53a-54a, 119-120a; Tr. 61-64 (describing "a drastic decline in the overall quality and health of the forest over a large portion of the area"). There was hardly any overstory left in some areas. J.A. 83. Instead, new openings pierced the once largely-closed canopy, and oak trees were replaced by

abundant buttonbush and other invasive, undesirable, water-tolerant species that precluded new trees from taking hold. J.A. 76, 83, 99-100, 113-14. In 2000, the Management Area was "a bottomland hardwood ecosystem in a state of collapse." J.A. 113. Most of the nuttall oaks, red oaks, and sweetgum were either dead or dying. J.A. 113-14. By 2005, extensive areas had reached a "tipping point"—meaning that invasive, undesirable wetland species had progressed to a point where they would inhibit or prevent any degree of natural regeneration of these desirable species. J.A. 100-01.

A timber survey conducted in January 2001 confirmed that approximately 6,990 acres of the Management Area were in a rapid state of decline and degradation. J.A. 376-77, 381-82, 385-89. The survey observed excessive mortality in all tracts surveyed except for two control stands that were not subject to the Corps' flooding. J.A. 384. Outside the control stands, mortality in oaks and gums ranged from 15-60%. J.A. 384; *see also* J.A. 383 (mortality in the control stands was less than 2%). Roughly 30-40% of the trees that were not dead showed severe die-back in the crowns. J.A. 384. Before the Corps' deviations, in contrast, average mortality and dieback was only about 1-2%. J.A. 385. The damage to the Management Area was initially estimated to exceed $4.7 million. J.A. 377, 390-98. This appraisal was increased by $1.9 million after a second timber cruise conducted in December 2001 identified an additional 11,633 acres that, while not as severely damaged as the initial study area, clearly had tree mortality and tree decline well above normal background levels. J.A. 362-72. Because bottomland hardwoods like nuttall oak were unlikely to regenerate naturally after

undesirable wetland species invaded the Management Area, a restoration program was recommended for the original 6,990-acre survey area that was projected to cost the Commission between $5 million and $5.7 million. J.A. 416-24; *see also* Tr. 999-1000, 1630; Pl. Exh. 501, Tr. 1000.

D. The Trial Court's Award of Just Compensation

Following a two-week trial that included eighteen witnesses, a site visit, pre- and post-trial briefing, and post-trial argument, the Court of Federal Claims (Judge Charles F. Lettow) found that it was "evident" that the Corps had taken the Commission's property "as demonstrated by water gauge levels from 1993 to 1999 indicating higher-than-normal levels in the river, and evidence concerning the Corps of Engineers' deviations from the original water control plan from 1993 to 2000 indicating higher-than-originally-planned releases of water into the river." Pet. App. 85a-86a. Though not the full amount of damages sought, the court held that the Commission was entitled to just compensation from the United States totaling $5,602,329.56 for timber lost and destroyed and $176,428.34 for a regeneration program to address areas severely affected by invasive wetland species. Pet. App. 161a.

Detailed and extensive fact finding supports the Court of Federal Claims' conclusion and timber damages award. The court first determined that evidence presented at trial shows that "the government's superinduced flows so profoundly disrupted certain regions of the Management Area that the Commission could no longer use those regions

for their intended purposes, *i.e.*, providing habitat for wildlife and timber for harvest." Pet. App. 91a-92a. The court explained, during moderate drought years in 1999 and 2000, a "relatively sudden collapse" occurred because persistent flooding and saturated soil during the growing seasons damaged root systems to the point the trees were unable to support themselves. Pet. App. 91a. It found testimony of one of the government's own experts, Dr. King, to be "the most dramatic" given that he acknowledged that the Corps' deviations resulted in "substantial additional flooding" and agreed the flooding lasted longer than would have occurred under the original, authorized plan. Pet. App. 111a. The court concluded, "[i]n short, evidence put forward by the Commission and admissions by the Corps of Engineers indicate the significant impact of flooding on the bottomland hardwood timber in the Management Area." Pet. App. 124a. It described the damage as "catastrophic mortality and loss." Pet. App. 124a; *see also* Pet. App. 122a-123a, 128a.

The court additionally found that "the effect of deviations in the Management Area was predictable, using readily available resources and hydrologic skills." Pet. App. 99a. It observed that "the Corps of Engineers had been repeatedly warned by members of the Commission that the ongoing deviations were causing flooding in the Management Area that could potentially damage the bottomland hardwood trees owned by the Commission." Pet. App. 98a. Further, the Corps would have been able to predict both that the deviations would increase flooding on the Management Area and that the flooding would cause timber damage if it had performed "a reasonable investigation of the effects the deviations would have on downstream water levels." Pet. App. 99a. In fact,

a computerized modeling program was available to the Corps that could have been used to evaluate the potential effects of its deviations from the approved water control plan. Pet. App. 99a. After rejecting various intervening causes alleged by the government, the court resolved that the government "set [a] chain of events into motion through authorized deviations from the water control plan" that formed a "direct, natural, and probable path" to the significant growing season flooding experienced on the Management Area. Pet. App. 101a-102a. It held that it was consequently "evident that the distinguishing factor producing the excessive mortality in 1999 and 2000 was the trees' roots' inability to withstand the moderate drought in those years after the extensive damage they suffered during the floods from 1993 to 1999." Pet. App. 128a.

E. The Federal Circuit's Fractured Reversal and Denial of Panel Rehearing and Rehearing *En Banc*

On appeal by the government, a divided Federal Circuit panel (2-1) reversed the damages awarded to the Commission without considering the extensive factual findings made by the Court of Federal Claims. The panel majority reasoned that it "need not decide whether the flooding on the Management Area was sufficiently substantial to justify a takings remedy or the predictable result of the government's action, because the deviations were by their very nature temporary and, therefore, cannot be inevitably recurring or constitute the taking of a flowage easement." Pet. App. 22a (internal quotes omitted); *see also* Pet. App. 14a (acknowledging "[w]ith respect to the substantiality of the flooding, the Commission's testimony showed that the Management Area was

flooded regularly during the 1993-2000 period, including during the tree growing season"). It reached this conclusion despite recognizing the well-established principle that "if a particular government action would constitute a taking when permanently continued, temporary action of the same nature may lead to a temporary takings claim." Pet. App. 18a (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 328 (1987)). The panel majority justified its reversal of the Court of Federal Claims' judgment in favor of the Commission by stating that "cases involving flooding and flowage easements are different." Pet. App. 18a.

In her dissent, Judge Newman strongly disagrees with this distinction and characterizes the Federal Circuit's ruling as "contradict[ing] the entire body of precedent relating to the application of the Fifth Amendment to government-induced flooding." Pet. App. 37a. She explains that all cases involving temporary government invasions—including flooding cases—are subject to a "complex balancing process." Pet. App. 32a (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 n.12 (1982)). "Precedent does not require constant or permanent flooding, and eventual abatement of the flooding does not defeat entitlement to just compensation; the specific facts must be considered, as for any invasion of property." Pet. App. 33a (collecting Supreme Court and Federal Circuit cases). In Judge Newman's view, "[p]recedent recognizes that flood-induced destruction of timber is a permanent injury, and is compensable under the Fifth Amendment." Pet. App. 35a (citing *Cooper v. United States*, 827 F.2d 762 (Fed. Cir. 1987)). Accordingly, she warns that the panel majority's focus on the temporal aspect of the

government's intrusion to the exclusion of other relevant factors is error. Pet. App. 37a. She identifies the correct question as asking "whether the increased flooding caused significant injury before the flooding was abated, such that, on balance, the Fifth Amendment requires just compensation." Pet. App. 36a.

Despite these strongly differing opinions, the Federal Circuit denied the Commission's request for *en banc* rehearing and also denied panel rehearing in another markedly divided decision (7-4). No majority opinion was issued. Instead, the only opinion that supports the rehearing denial is a concurrence by Judge Dyk, joined by Judges Gajarsa and Linn. Specifically, Judge Dyk states, "the panel majority did not create a blanket rule under which any flood-causing policy that is labeled temporary by the government will allow the United States to avoid takings liability." Pet. App. 168a. He identifies the government's intent not to implement a permanent policy as the decisive factor. Pet. App. 168. He then acknowledges that fifty consecutive and identical one-year deviations might support finding that a taking has occurred if the government adopted them with the intent to create a permanent or recurring condition. Pet. App. 169a.

Two dissents were written in response to this concurrence and the Federal Circuit's denial of any form of rehearing. In one, Judge Newman reiterates that the panel majority's new rule that an injury caused by temporary flooding cannot be a taking is "contrary to law and precedent." Pet. App. 178a. With respect to Judge Dyk's statement that no *per se* rule was created in the panel decision he authored, she

responds that "a single judge cannot rewrite the words and change the ruling of the court's issued opinion. If anything, such an attempted qualification adds confusion, not clarity, to this precedential decision." Pet. App. 179a. Judge Newman adds that the panel majority also improperly created a new rule that it is not necessary to apply the proper balancing test when determining if the government's actions effected a taking. Pet. App. 178.

In a second dissent, Judge Moore, joined by Judges O'Malley and Reyna, agrees with Judge Newman that the panel majority's reversal relied on "a rigid, unworkable and inappropriate black letter rule." Pet. App. 176a. She points out that allowing the "temporary" label for the Corps' deviations to control the takings analysis "elevates form over substance and leads to untenable results with enormous future consequences." Pet. App. 171a. The takings inquiry instead "'requires consideration of whether the effects . . . experienced were the predictable result of the government's action, and whether the government's actions were sufficiently substantial to justify a takings remedy.'" Pet. App. 171a (quoting *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003)); *see also* Pet. App. 176a. In contrast to Judge Dyk's fifty-year deviation hypothetical, Judge Moore queries: "If a flowage easement which is terminated after eight years can be a compensable taking, why can't an eight year flowage easement or eight consecutive one year flowage easements?" Pet. App. 174a. She answers, "With all due respect, the question of whether eight years of deviations are similarly adequate is best left to the fact finder – the Court of Federal Claims." Pet. App. 174a-175a.

SUMMARY OF THE ARGUMENT

This case presents the question of whether the government can take property for public use through temporary flood invasions. It has been the rule until now that if the government must pay when it permanently uses a property, it must also pay when its temporary use substantially intrudes upon that property. The Federal Circuit nonetheless announced a new categorical legal rule that temporary flood invasions are exempt from the Takings Clause. Because the Federal Circuit's permanency rule was outcome determinative in the Commission's case and cannot stand, this Court should reverse and remand for the Court of Appeals to apply the established physical takings analysis.

Ia. Government action that amounts to a physical invasion is the most direct means of taking property for public use. When the government takes actions that directly, naturally, or probably result in physical invasions that substantially intrude on a protected property interest, this Court has invariably awarded just compensation regardless of the particular mode of invasion. While permanent and exclusive occupations are substantial intrusions in all circumstances, the question with other direct physical invasions is whether the intrusion is, on balance, substantial. Courts should consider all the circumstances of the government's invasions before rejecting any physical takings claim.

b. As this Court has had more occasions to address the different ways in which governments can press property into public service, it has clarified that even temporary public use is compensable. In holding

that temporary physical invasions can take property, this Court has recognized that such invasions can intrude in ways that permanent invasions may not. The government may, of course, take a limited interest but it must pay for what it takes, even if it abandons the interest or uses it only for a limited time.

c. When the government's mode of invasion is flooding, its invasions are subject to the same constitutional analysis as for all other types of physical invasions. Despite clear case holdings that temporary physical invasions are compensable and that floods are physical invasions subject to the same analysis as other physical invasions, the Federal Circuit concluded that temporary flood invasions are exempt from the Takings Clause. This categorical permanency requirement arises from a fundamental misunderstanding of isolated dicta from early flooding cases. This Court's later takings cases squarely refute the idea that permanency is a mandatory requirement in any takings case, and, in any event, those dicta never actually stood for the categorical requirement applied here by the Federal Circuit.

IIa. The Federal Circuit's unprecedented exception for temporary flood invasions conflicts with the bedrock principle that it is the owner's loss, not the taker's gain, that defines a taking. Viewing the situation entirely from the government's perspective, the Federal Circuit treated each of the six years of consecutive flood invasions as isolated events and hinged the government's potential for liability on its subjective intent, *i.e.*, whether it intended to flood the Commission's property permanently. The court considered only its new categorical permanency requirement and never considered how much damage

the United States' flooding actions caused or how much it preempted the Commission's use and enjoyment of its property. Here, the Commission's loss is massive and permanent, and the Corps' flood invasions substantially preempted the use and enjoyment of the Commission's property maintained as an important wildlife habitat. When the takings question is approached from the landowner's perspective, as it should be, it is apparent that these flood invasions pressed the property into public use even though the government eventually ended its invasive actions.

b. The Federal Circuit's categorical permanency requirement for flood cases is manifestly unfair. If the government takes an action, the direct, natural, or probable result of which is a physical invasion that substantially intrudes on a protected property interest, there is no justification for withholding payment of just compensation simply because it limits the duration of its invasion. While the government may deliberately shift burdens to one owner to benefit others, the Takings Clause mandates that just compensation be made to the one whose property is taken. This is no less true when the invasion is limited in duration.

ARGUMENT

I. The Takings Clause Analysis Applies Uniformly To All Physical Invasions Including Temporary Flood Invasions.

The Fifth Amendment Takings Clause's "guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[1] The pivotal question under the Takings Clause is whether the government has in fact put property to public use so as to require just compensation. Over the years, a number of artificial distinctions protecting the government have risen and then, as decisions exposed their inherent unfairness, fallen away. This case presents the rise of another such unfair, artificial distinction that permanent flood invasions *are* compensable under the Takings Clause while temporary flood invasions *are not*. No physical invasion is exempt from the Takings Clause solely for lack of permanency. If the government presses private property into public service, the public must pay for its

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[1] Just as it guarantees protection of private property of citizens, the Takings Clause protects the property of States and their subdivisions from appropriation by the Federal Government without "just compensation." *United States v. Carmack*, 329 U.S. 230, 241-42 (1946); *cf. California v. United States*, 395 F.2d 261, 263-64 & n.4-5 (9th Cir. 1968) (holding that the Fifth Amendment protects property from appropriation without just compensation "even when the property has been dedicated by the State to public use").

use. "Of course, payment need only be made for what is taken, but for all that the Government takes it must pay." *United States v. Dickinson*, 331 U.S. 745, 750 (1947). This is true even if that use is temporary. *Id*.

A. The government takes property for public use when its direct physical invasions substantially intrude on a protected property interest.

Government action that amounts to a physical invasion is the most direct means of taking property for public use. *E.g.*, *Loretto*, 458 U.S. at 438-39; *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *United States v. Causby*, 328 U.S. 256, 265-66 (1946); *United States v. Cress*, 243 U.S. 316, 327-28 (1917). All physical invasions inflict injury because they tangibly subordinate the property owner who cannot eject the government. *See Loretto*, 458 U.S. at 436 (explaining that a physical invasion or occupation is "qualitatively more severe than a regulation of the *use* of property, since the owner may have no control over the timing, extent, or nature of the invasion").

The fundamental difference between physical invasions and regulatory interferences can be seen by comparing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 306 (2002), with *United States v. General Motors Corp.*, 323 U.S. 373, 380 (1945). In *Tahoe-Sierra*, regulators imposed temporary moratoria on land development, intending to "maintain the status quo." 535 U.S. at 306. Regarding the moratoria at issue, the district court had found that no plaintiff offered specific evidence of an injury. *See id.* at 314 n.8, 315 & n.11. Whereas in *General Motors*, this Court recognized that

when the government asserts the right to physically occupy for even one day, even if it does not actually occupy, it inflicts an injury. 323 U.S. at 380; *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.") (internal citations omitted).

In assessing whether the government has taken property through physical invasions, the inquiry has long involved an inherent balancing process. This process, though, is not standardless. *See Loretto*, 458 U.S. at 427. Over the years, this Court's decisions have made clear that direct invasions that substantially intrude on another's property interest invariably require just compensation. *E.g.*, *id.* at 427, 438, 441 (concluding that cable installation involving direct physical attachment of plates, boxes, wires, bolts, and screws to a building for an indefinite period met the traditional test in which "this Court has invariably found a taking" because "the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation"); *see also Causby*, 328 U.S. at 265.

Harmonizing the litany of takings cases, Judge Newman below described the takings analysis that the Federal Circuit should have applied in this case. Undisturbed by the panel majority were the Court of Federal Claims' findings that the Corps of Engineers' flood invasions were objectively foreseeable as the direct, natural, and probable result of the deviations.

See Pet. App. 99a (finding that the Corps "would have been able to predict both that the deviations would increase the levels of the Black River in the Management Area and that the flooding caused by these increased levels would damage timber in the Management Area" if it had performed a "reasonable investigation" of the downstream effects of its deviations). When the invasion is foreseeable as the direct, natural, or probable result of government action, the question is whether the intrusion is, on balance, substantial such that the Takings Clause requires just compensation. *Cf.* Pet. App. 36a (Newman, J., dissenting). The Federal Circuit's foreseeability analysis, developed over the years and applied by the Court of Federal Claims below, is an objective and factual one serving to differentiate between incidental damages and the kind of direct invasions that physical takings so often illustrate. *See, e.g.*, *Moden v. United States*, 404 F.3d 1335, 1343 (Fed. Cir. 2005); *see also Bettini v. United States*, 4 Cl. Ct. 755, 760 (1984).

Loretto, for example, involved a direct physical invasion at the hands of the government. *See* 458 U.S. at 438. There the issue was whether cable equipment installed on a building constituted a taking. *Id.* at 426. A New York statute directed "that a landlord must permit a cable television company to install its cable facilities upon his property," and the equipment could remain indefinitely, "[s]o long as the property remains residential and a [cable] company wishes to retain the installation." *See id.* at 421-22, 439 & n.17. This Court held that the equipment—installed and retained by a private party pursuant to a legislative grant of authority—effected a taking "without regard to whether the action achieves an important public

benefit or has only minimal economic impact on the owner." *Id*. at 434-35. The rule from *Loretto* is that when such an invasion is permanent or indefinite, it is such a substantial intrusion that it constitutes a taking in all circumstances. *See id*. at 441.

Courts have similarly held that the complete destruction of an owner's entire interest constitutes an intrusion commanding just compensation. *See, e.g.*, *General Motors*, 323 U.S. at 384 ("And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to a taking."); *United States v. Welch*, 217 U.S. 333, 339 (1910) ("But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end."); *see also Armstrong*, 364 U.S. at 48 ("The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure.").

But neither destruction nor permanent occupation is necessary to justify compensation. *Causby*, 328 U.S. at 267-68; *see also General Motors*, 323 U.S. at 378 ("Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."). In *Causby*, the question was whether a taking was effected by a one-year airport lease with six-month renewals (beginning in 1942) that led to navy aircraft overflights at low altitudes. 328 U.S. at 258. The overflights prevented the owner's continued use of the property as a commercial chicken farm. *See id.* at 259,

262. On those facts, this Court agreed "that a servitude ha[d] been imposed upon the land." *Id.* at 267. "[T]he land [was] appropriated as directly and completely as if it were used for the runways themselves," and it was immaterial that the property might still be used for something else. *Id.* at 262 (observing "no material difference" when use and enjoyment is not completely destroyed, because airplane overflights "might reduce . . . an orchard to a vegetable patch," so that while "[s]ome value would remain," the overflights "would limit the utility of the land and cause a diminution in its value"); *see also Kaiser Aetna*, 444 U.S. at 180 ("[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation."); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30 (1922) (concluding that landowner stated sufficient specific facts to warrant a finding that a servitude had been imposed on allegations that the United States erected a fort nearby, established a battery of heavy coast defense guns there, and fired those guns over petitioner's land).

Though not every physical invasion linked to the government will result in a substantial intrusion, the courts should consider all relevant factors before summarily rejecting a physical takings claim. Additional factors weighing in favor of just compensation include:

- Whether the government injures an interest in property through actions that only the government could take. *See Armstrong*, 364 U.S. at 48 ("It was because the Government for its own advantage destroyed the value of the

liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done.");

- Whether the owner objected to the government's invasions and the government nonetheless continued its actions. *United States v. Archer*, 241 U.S. 119, 131 (1916); *see also id*. at 143-44 (Pitney, J., dissenting); or

- Whether the government can argue that its interference is compelled by an exigent circumstance like war. *See, e.g.*, *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

Here, the Court of Federal Claims specifically found that the government's actions had foreseeably caused substantial damage to the Commission's timber and habitat. *See* Pet. App. 99a ("In short, the effect of deviations in the Management Area was predictable, using readily available resources and hydrologic skills."); Pet. App. 111a (citing the United States' own expert testimony that "[t]he Corps's deviations resulted in substantial additional flooding on the [Management Area]"); Pet. App. 122a-123a (finding that the Commission offered "significant and persuasive evidence" linking the Corps' deviations and "resulting catastrophic mortality in the sections of the Management Area that were subject to flooding and saturated soils during the growing seasons from 1993 to 2000"); *see also* Pet. App. 88a, 91a-93a, 98a-102a, 107a-126a. Indeed, if the United States had simply come and looked during its deviations it would have seen the flooding it caused. *See* Pet. App. 99a. The Commission and other interest groups even specifically

warned the Corps about the impending damage to the Commission's property. *See* Pet. App. 7a, 15a, 49a-52a, 98a-99a; *see also* J.A. 59-66, 399-411, 415. Nevertheless, the Corps moved forward to make permanent the water release changes in the Clearwater Lake Water Control Manual. *See* Pet. App. 51a-52a; *see also* J.A. 348-60.

The Federal Circuit did not dispute any of those facts. *E.g.*, Pet. App. 14a ("With respect to the substantiality of the flooding, the Commission's testimony showed that the Management Area was flooded regularly during the 1993-2000 period, including during the tree growing season."); *see also* Pet. App. 36a (Newman, J., dissenting), 172a (Moore, J., et al., dissenting from denial of rehearing). It simply deemed them irrelevant. Pet. App. 22a (holding that it "need not decide whether the flooding on the Management Area was 'sufficiently substantial to justify a takings remedy' or 'the predictable result of the government's action,' because the deviations were by their very nature temporary") (internal citations omitted). This was error. The Corps' actions that foreseeably resulted in substantial flood invasions that killed or degraded more than 18 million board feet of important timber resources effected a taking of the Commission's property on those grounds alone. Before the Federal Circuit categorically rejected the possibility of a taking, it should have considered *all* the circumstances of the government's invasions as found by the Court of Federal Claims.

B. Temporary physical invasions, which can intrude in ways that permanent invasions do not, can take property for public use.

Justice Brennan once observed: "Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657-58 (1981) (Brennan, J., et al., dissenting).[2] Over time, as this Court has had occasion to examine more of the ways in which governments use private property, its decisions have more clearly articulated the rule that temporary use is compensable. *See*, *e.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 12-14 (1949); *General Motors*, 323 U.S. at 382-83; *see also First English*, 482 U.S. at 319. In *First English*, Los Angeles County had imposed a land use regulation which the landowner alleged denied it all use of its land; however, the county argued it owed no compensation for the period of a "temporary taking" before the measure was declared unconstitutional. *Id.* at 308-09. This Court addressed whether the Takings Clause requires the government to pay for "temporary" regulatory takings. Ultimately answering in the affirmative, the Court reviewed its earlier decisions where the government had "only temporarily exercised its right to use private property." *Id.* at 318 (citing *United States v. Dow*, 357 U.S. 17, 26 (1958); *Kimball Laundry*, 338 U.S. 1; *United States v. Petty Motor Co.*, 327 U.S. 372, 375 (1946); *General Motors*, 323 U.S.

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[2] Justice Brennan, with Justices Stewart, Marshall, and Powell, discussed the merits of a takings claim not reached by the majority. *San Diego Gas & Elec. Co.*, 450 U.S. at 646.

373). The Court concluded that "temporary" takings which deny all use of property "are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.* at 318. Where an action amounts to a temporary taking, the government is required to pay for the use of the land during that period. *Id.* at 319.

More recently, in *Tahoe-Sierra*, this Court considered whether a government agency's temporary moratoria on development effected unconstitutional regulatory takings of property. 535 U.S. 302. While contrasting differences between physical takings and regulatory takings, the Court explained that physical invasions generally must be compensated regardless of whether the particular land interest taken constitutes an entire parcel or just a part thereof, and even though the invasion is temporary. *Id*. at 322 (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951); *Petty Motor Co.*, 327 U.S. 372; *General Motors*, 323 U.S. at 373). It is clear, therefore, that once an invasion brings about a taking of property, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English*, 482 U.S. at 321.

The government may, of course, take a limited interest. *E.g.*, *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627 (1961) (holding that a flowage easement is an interest in property and the government's destruction of such "would ordinarily constitute a taking of property within the meaning of the Fifth Amendment"). But it must pay for what it takes even if it abandons that interest or takes it for only a limited duration. *First English*, 482 U.S. at

321; *Dow*, 357 U.S. at 26; *Dickinson*, 331 U.S. at 750; *Causby*, 328 U.S. at 267-68 (agreeing that a servitude was imposed regardless of whether the government intended to continue its actions, and remanding to determine for compensation whether the easement was permanent or temporary).[3] As the Federal Circuit itself previously said:

> [T]he government when it has taken property by physical occupation could subsequently decide to return the property to its owner, or otherwise release its interest in the property. Yet no one would argue that that would somehow absolve the government of its liability for a taking during the time the property was denied to the property owner. All takings are "temporary," in the sense that the government can always change its mind at a later time, and this is true whether the property interest taken is a possessory estate for years or a fee simple acquired through condemnation, or an easement of use by virtue of regulation. The long drawn out battle of *Agins*/*San Diego Gas*/*First Lutheran Church* was not a fight over principle, but a dispute over the illogical use of a word.

Hendler v. United States, 952 F.2d 1364, 1376 (Fed. Cir. 1991).

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[3] *Accord Kimball Laundry*, 338 U.S. at 13; *General Motors*, 323 U.S. at 382-83; *see also Hendler*, 952 F.2d at 1376; *United States v. Muniz*, 540 F.3d 310, 312 (5th Cir. 2008) (involving an express condemnation by the United States of a temporary easement); 33 C.F.R. § 211.1 (Corps of Engineers regulation defining "real estate" to include "rights-of-way or easements, whether temporary or permanent").

Indeed, temporary invasions can be even more injurious than permanent occupations. In *Kimball Laundry*, for example, the government temporarily used a private laundry during World War II. 338 U.S. at 3. Reasoning that the government's temporary use had put the owner in the difficult spot of being unable to start a new laundry because he faced the prospect of then having two properties to operate when the United States returned the first laundry, the Court approved additional damages for injury to business goodwill. *Id.* at 14. The reasoning is that if the government permanently condemns a property, the owner might at least start over somewhere else. But where the government puts the property to temporary use, the landowner is in a worse position and so additional damages are proper to ensure it receives just compensation. *Id.* at 15; *see also General Motors*, 323 U.S. at 382 ("It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits . . . ."); *Cooper*, 827 F.2d at 763 ("In addition, damages may be awarded under the Fifth Amendment for injuries from a temporary taking where the same injuries would not be compensable if a permanent taking occurred.").

C. When the government invades by flooding, its invasions are subject to the same Takings Clause analysis as any other physical invasion.

For more than a century, government-induced flood invasions have been recognized as physical invasions by which the government can put private property to public use. *See, e.g.*, *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871) (holding that "where real estate is actually invaded by superinduced

additions of water . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution"); *accord United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *Dickinson*, 331 U.S. 745; *Jacobs v. United States*, 290 U.S. 13 (1933); *Cress*, 243 U.S. 316; *Welch*, 217 U.S. 333; *United States v. Lynah*, 188 U.S. 445 (1903). Like they do for any other physical invasion, courts award just compensation when the government takes actions that substantially intrude on a protected property interest through direct flood invasions. *See, e.g.*, *Cress*, 243 U.S. at 327-28 (awarding just compensation for a permanent condition of intermittent flood invasions, finding it "settled" that "overflowing lands by permanent backwater is a direct invasion, amounting to a taking," and reasoning that neither complete nor "almost complete destruction" was necessary because "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking"); *see also Ridge Line, Inc.*, 346 F.3d at 1356 (describing the takings analysis for flood invasions as applying the Federal Circuit's foreseeability analysis and considering "the nature and magnitude of the government action").

Permanent and exclusive floods are permanent physical takings. *Lynah*, 188 U.S. at 469; *Pumpelly*, 80 U.S. at 177-78; *see also Loretto*, 458 U.S. at 428. Intermittent floods can likewise take property. *See Cress*, 243 U.S. at 328; *Cooper*, 827 F.2d at 763-64; *see also Loretto*, 458 U.S. at 436 n.12 ("As . . . the intermittent flood cases reveal, such temporary limitations are subject to a more complex balancing process to determine whether they are a taking."). It naturally follows that the government can take

property by increasing overflows on lands already subject to seasonal flooding. *See Jacobs,* 290 U.S. at 15; *see also Cooper*, 827 F.2d at 763-64; *Barnes v. United States*, 538 F.2d 865, 869, 873 (Ct. Cl. 1976). In *Jacobs,* where the United States built a dam that increased the already-occurring occasional overflows of the owner's lands, the Court observed—in addressing only the issue of whether interest should be part of a just compensation award—that "[a] servitude was created by reason of intermittent overflows which impaired the use of the lands for agricultural purposes." 290 U.S. at 16. It observed that the government had "contemplated the flowage of the lands, that damage would result therefrom, and that compensation would be payable." *Id.* The Court characterized this servitude as a "partial taking of the lands for which the government was bound to make just compensation under the Fifth Amendment." *Id.*

Despite clear holdings that temporary physical invasions are compensable, and that floods are physical invasions subject to the same analysis as other physical invasions, the panel majority below leaned heavily on dicta in older flooding cases like *Cress* and *Sanguinetti v. United States*, 264 U.S. 146 (1924), to conclude that temporary flood invasions are exempt from the Takings Clause. The confusion about permanency in flood cases stems from a misunderstanding of this Court's 1917 decision in *Cress* and a misuse of dicta in later cases citing it. *See Cress*, 243 U.S. at 328; *cf. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 531 (2005) (describing in a different takings context how, "[o]n occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase-however fortuitously coined"). The *Cress* decision—where the

phrase "inevitably recurring" first arose—only discussed inevitably recurring floods because the facts there presented them. *See Cress*, 243 U.S. at 328. On those facts, it unsurprisingly found a taking. *See id.* ("There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows . . . .").

Courts in later cases sometimes referenced the "inevitably recurring" floods language in *Cress* in ways that can be misconstrued as perceiving a categorical requirement. *See, e.g.*, *Fromme v. United States*, 412 F.2d 1192, 1197 (Ct. Cl. 1969) *cited in* Pet. App. 26a. But even if *Fromme*, for example, could be so distorted, the Court of Claims clarified that same year that permanency is *not* a required element. *See Nat'l By-Products, Inc. v. United States*, 405 F.2d 1256, 1273 (Ct. Cl. 1969) ("The distinction between 'permanent liability to intermittent but inevitably recurring overflows,' and occasional floods induced by government projects, which we have held not to be takings, is, of course, not a clear and definite guideline."). Because inverse condemnation claims arise from the Constitution, and thus are not judicially made common law claims, *Cress* does not bar recovery in cases like the Commission's involving flood invasions caused by temporary government actions. *Cf. Argent v. United States*, 124 F.3d 1277, 1282 (Fed. Cir. 1997) (noting that "while the facts, reasoning, and rules of [*United States v. Causby*] have always guided this corner of takings law, they do not imprison it" by "limit[ing] a takings claim to only those facts").

Indeed, the Federal Circuit itself previously found a taking on facts closely analogous to the situation

here. In *Cooper*, the Federal Circuit addressed a 1979 construction blockage that increased the already-occurring seasonal flooding on bottomland timber while the Corps of Engineers tried to clear the blockage. 827 F.2d at 763-64. The Corps succeeded in clearing the blockage in 1984, but the additional growing-season flooding had killed the plaintiff's timber by then. *Id.* *Cooper* held that the government had taken the timber. *Id.* At a minimum, it plainly held that temporary government conditions that intermittently flood *can* take an owner's interest in timber. *Id*. at 763.

Occasions when courts declined to award compensation in flood cases generally involved at least a problem with causation or foreseeability, such as when flooding arose from an extreme rain event or where the actions conferred benefits greater than the injuries they inflicted. *See, e.g.*, *Sanguinetti*, 264 U.S. at 149; *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 711 (Ct. Cl. 1955) (finding the damage to trees was not the foreseeable result of government actions in drilling four miles from plaintiffs' spring that, in turn, hit water that ran into a lake along with unusually heavy snow runoff that caused an overflow of saltier water that, in turn, contaminated the spring from which plaintiffs irrigated with knowledge of the salty condition); *Fromme*, 412 F.2d at 1196 n.2 (observing that the government's new channel was "very beneficial to the plaintiff in connection with the development of an extensive and valuable deposit of sand and gravel in her land") *cited in* Pet. App. 34a-35a (Newman, J., dissenting).

Sanguinetti, for example, did not hold that a flood-based takings claim must fail if the government's

actions are "too temporary in nature" as the United States has suggested. *Compare* Br. Opp. 11 *with Sanguinetti*, 264 U.S. at 150. Although *Sanguinetti* did state that for flooding to take property it must "constitute an actual, permanent invasion of the land," that was not the only factor considered. *Id*. at 149. Rather, in concluding that the government did not take property through an over-engineered diversion canal that ultimately proved insufficient to handle record-setting rain events, *Sanguinetti* expressly noted that there were no findings of fact that a significant flooding intrusion was the foreseeable result of the government's canal design and construction. *Id.* at 149-50. The Court pointedly considered that the amount of permanent damage was not shown, the landowner had not lost the "customary use of the land" except for short periods of time, and the flooding was neither "the direct or necessary result of the structure" nor "within the contemplation of or reasonably to be anticipated by the government." *Id.*

In contrast to the several factors considered in *Sanguinetti*, the Federal Circuit here refused to consider anything but the duration of the government's actions because the panel majority deemed anything else irrelevant to its analysis. Br. Opp. 12-13(ii); *see also* Pet. App. 22a. Even the United States, as the appellant below, described the "correct question" as looking at more than just the duration of its invasions. *See* Pet. App. 192a-193a; *see also* Pet. App. 178a (Newman, J., dissenting from denial of rehearing).

If this Court's decisions in *General Motors*, *Causby*, and *Kimball Laundry*, which came after *Cress* and *Sanguinetti*, did not settle the issue, the idea that permanency is ever a threshold requirement in any

takings case should have been finally laid to rest by *Tahoe-Sierra* in 2002. *See Tahoe-Sierra*, 535 U.S. at 337 ("[W]e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other."). It is apparent that the Federal Circuit's decision in the Commission's case inferred an artificial distinction from isolated dicta taken out of context in early takings decisions and incorrectly held it to be a binding, categorical rule that survived every contrary modern decision of both itself and this Court. The fact that confusion about permanency continues to persist at the level of the Federal Circuit shows how much this Court's clarity is needed.

II. Carving An Exception For Temporary Flood Invasions Conflicts With Fundamental Takings Clause Principles.

While acknowledging the rules that temporary physical invasions can take property and that floods are physical invasions, the Federal Circuit carved temporary flood invasions from the Takings Clause's protections. *See* Pet. App. 18a, 22a; Br. Opp. 13 (describing as a "requirement"); Br. Opp. 14 (describing as a "threshold"). Besides the fundamental unfairness of empowering the government to temporarily flood property and cause massive, permanent damage without compensation simply because its floods are not permanent, the decision conflicts with bedrock Takings Clause principles. Resting on misapplied, isolated dicta, the decision reflects a troubling analytical shift that protects the government's position without considering the owner's

loss. There is no fair justification and no precedent for the Federal Circuit's categorical rule.

A. The Federal Circuit's categorical permanency requirement protects the government's position without regard to the owner's loss.

The Takings Clause protects owners, not the government. *See General Motors*, 323 U.S. at 378 ("The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking."); *Nat'l By-Prods.*, 405 F.2d at 1275 ("It is a long settled principle that a taking is not affected by the extent of the benefit to the Government, but solely by the amount of injury to the landowner."). The Federal Circuit's decision below shifts this principle, turning the analysis into an exercise in rationalizing the government's position. This explains how it could view decisions like *Sanguinetti* and *Fromme* as announcing a binding permanency rule while distinguishing *Cooper* in a footnote. *See* Pet. App. 18a, 26a-27a & n.7. The danger this shift presents is precisely the one this Court denounced in *Pumpelly* more than a hundred years ago: it perverts the Takings Clause "into a restriction upon the rights of the citizen . . . instead of the government . . . ." *Pumpelly*, 80 U.S. at 177-78; *see also Dickinson*, 331 U.S. at 748 ("The Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.'").

Government entities have historically defended themselves by advancing all kinds of artificial distinctions, as the United States does here. But following the correct principles underlying the

Constitution, takings law has steadily moved away from such distinctions. In the first inverse condemnation case before it, this Court resoundingly rejected the first of these distinctions that title stayed with the landowner when the government permanently flooded it, saying:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security of rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

Pumpelly, 80 U.S. at 177-78.

And for a time, some believed that the Takings Clause provided no protection against anything but a total, permanent, and exclusive physical occupation. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (discussing the history of takings jurisprudence). That distinction died in the twentieth century. *See, e.g.*, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (recognizing that the government can subject private property to public use through regulatory interferences); *Causby*, 328 U.S. at 262 (holding that the government can take property without totally destroying the owner's use and enjoyment). The Takings Clause protects every property interest an owner may have. If the government chooses to take less than the fee simple title, it still must pay.

Now the Federal Circuit has created another artificial distinction that hinges the possibility of a taking on whether the government *intends* to create a permanent flooding condition, which it speculates *might* be found after 50 consecutive years of identical deviations. *See* Pet. App. 21a-23a, 27a; *see also* Pet. App. 169a (Dyk, J., et al., concurring in denial of rehearing). This distinction, like those this Court has rejected before, ignores the owner's perspective. The Fifth Amendment's Takings Clause is designed to protect the people. Those protections cannot depend on the whim of the government as to how long it wants to use someone else's property. As Judges Moore, O'Malley, and Reyna recognized, allowing the government to subjectively dictate when its invasions might call for just compensation "elevates form over substance and leads to untenable results with enormous future consequences." Pet. App. 171a (Moore, J., et al., dissenting from denial of rehearing).

Showing again how it viewed the situation entirely from the government's perspective, the Federal Circuit never considered how much damage the United States' flooding actions caused or how much it preempted the Commission's use and enjoyment of its property. *See*, *e.g.*, Pet. App. 22a. Here, the Commission's loss is massive and permanent, and the Corps' flood invasions substantially preempted the use and enjoyment of the Commission's property maintained as an important wildlife habitat. Even in a regulatory takings analysis where the government has exercised otherwise valid police powers, the extent to which it interferes with investment-backed expectations (*i.e.*, the injury) is important. *See Lingle*, 544 U.S. at 540 (noting that the "inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests").

The Federal Circuit also treated each deviation as a wholly isolated action despite scientific consensus among both parties' experts that the consecutive years of flooding had a cumulative impact. *Compare* Pet. App. 24a-25a; *and* Pet. App. 167a (Dyk, J., et al., concurring in denial of rehearing); *and* Br. Opp. 3, 7, 10, 11 n.3, 13; *with* J.A.110-13 (describing nuttall and overcup oak as being unable to tolerate four or five years of anerobic conditions); *and* J.A. 175 (explaining that bottomland hardwood forest "is not adapted to six consecutive years of prolonged flooding"); *and* J.A. 331-33 (agreeing that that one year of growing season flooding will not typically induce mortality but multiple years can kill trees because the effects of flooding are cumulative); *see also* Pet. App. 89a, 107a-108a, 114a (rejecting the idea that the government's

actions were "isolated invasions that might merely constitute a tort").

The panel majority, although not entirely accurately, took pains to describe the various individual deviations to show that they were different. Pet. App. 6a-13a. But as even the United States' own expert witness testified, each successive year's flooding had a bigger impact than it otherwise would have had in isolation. *See* J.A. 331-33; *cf. Portsmouth Harbor*, 260 U.S. at 329-30 ("[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking]. Every successive trespass adds to the force of the evidence."). That growing season floods caused by the Corps' deviations continued for six consecutive years beyond any that had occurred naturally or artificially in recorded history made this an unprecedented flooding regime. *See* Pet. App. 88a, 107a; J.A. 83-84, 174-75. When the takings question is approached from the landowner's perspective, it is apparent that these flood invasions pressed the property into public use even though the Corps eventually decided to end its invasive actions.

B. Allowing the government to freely flood temporarily when it must pay to flood permanently is manifestly unfair.

To hold that *any* form of physical invasion by the government is not subject to the Fifth Amendment based solely on its intended duration comes nowhere near to fulfilling the purposes of the Takings Clause. That Clause requires just compensation to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice,

should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49; *see also Dickinson*, 331 U.S. at 748 ("The Fifth Amendment [Takings Clause] expresses a principle of fairness . . . ."); *Pennsylvania Coal Co.*, 260 U.S. at 416 ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."). The Federal Circuit's decision imposed a categorical requirement that squarely contradicts that purpose. Here, it renders irrelevant six years of actual invasions and massive, foreseeable damage. In this case, the Court of Federal Claims recognized that the Commission was affected to the tune of at least $5.6 million for timber taken and $176,428 needed to regenerate crucial bottomland hardwood habitat used by migratory birds, other wildlife, and recreationists.

The government is already immune in tort for damages caused by flood control projects. *See* 33 U.S.C. § 702c. Now under the Federal Circuit's ruling, the Corps need only refuse to make a decision on how it will act even one year from now to avoid takings liability. *See* Pet. App. 171a (Moore, J., et al., dissenting from denial of rehearing). This rule, if allowed to stand, will potentially affect everyone and everything, including wildlife and habitat, that lies upstream or downstream of a government flood control project. Holding that the government may freely invade temporarily by any mode allows it to do what *Armstrong* said the Takings Clause was designed to prevent.

That the Corps' purposes for temporarily changing its flood control plan may not have been malicious and might have advanced some public interest is beside the

question. "[T]he applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches. Nor can the vindication of those rights depend on the expense in doing so." *San Diego Gas & Elec. Co.*, 450 U.S. at 661 (Brennan, J., dissenting). While the Corps may be allowed to temporarily manipulate flooding regimes to benefit one at the expense of another, it must pay just compensation when it does so.

The Federal Circuit's categorical permanency rule is palpably unjust and unfair. The Court of Appeals should have confronted the question of whether the government may use the Commission's property for flood storage and inflict massive and foreseeable damage over the course of consecutive years without paying just compensation. So far it has not, outside of the dissenting opinions of four of its judges who would have found a taking. Pet. App. 36a (Newman, J., dissenting) ("No error has been shown in the trial court's view of the facts and law."); Pet. App. 172a (Moore, J., et al., dissenting from denial of rehearing) ("There is no error in [the trial court's] decision.").

CONCLUSION

This Court should reverse the Federal Circuit's decision and remand to that court for further proceedings.

Respectfully Submitted,

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