Nos. 2009-5121, 2010-5029

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ARKANSAS GAME & FISH COMMISSION,
Plaintiff-Cross-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

On Appeal from the United States Court of Federal Claims in
05-CV-381, Judge Charles F. Lettow

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PLAINTIFF-CROSS-APPELLANT IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Amicus curiae Cato Institute, a nonprofit corporation organized under the laws of Kansas, hereby states that it has no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public.

Amicus curiae National Federation of Independent Business (NFIB) Small Business Legal Center, a 501(c)(3) public interest law firm, is affiliated with the NFIB, a 501(c)(6) business association, which supports the NFIB Small Business Legal Center through grants and exercises common control of the NFIB Small Business Legal Center through officers and directors. No publicly-held company has 10 percent or greater ownership of the NFIB Small Business Legal Center.

Amicus curiae National Association of Home Builders (NAHB), a nonprofit corporation organized under the laws of Nevada, hereby states that it has no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public. NAHB has more than 800 state and local home builders associations with whom it is affiliated. Those associations are, to the best of NAHB's knowledge, nonprofit corporations that have not issued any shares of stock or securities to the public.

CERTIFICATE OF INTEREST

Counsel for Amici Curiae certifies the following:

1. The full name of the parties I represent are Pacific Legal Foundation (PLF), Cato Institute, National Federation of Independent Business Small Business Legal Center (NFIB), and National Association of Home Builders (NAHB).

2. I do not represent a real party in interest.

3. PLF, Cato Institute, NFIB, and NAHB have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

4. I did not represent any party in the United States Court of Federal Claims in this action. Below are the names and contact information for those representing Amici Curiae PLF, Cato Institute, NFIB, and NAHB in this action in this Court:

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CONSENT TO FILING

Plaintiff-Cross-Appellant Arkansas Game & Fish Commission has consented to the filing of this brief. Defendant-Appellant United States takes no position on the filing of this brief.

IDENTITY AND INTEREST OF AMICI

Pursuant to Federal Rule of Appellate Procedure 29, Pacific Legal Foundation, the Cato Institute, National Federation of Independent Business Small Business Legal Center, and the National Association of Home Builders submit this brief amicus curiae in support of Plaintiff-Cross-Appellant Arkansas Game & Fish Commission. Because of each amicus applicant's history and experience with regard to issues affecting private property rights, amici believe that their perspectives will aid this Court in considering the parties' arguments.

Pacific Legal Foundation (PLF) was founded almost 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or amicus curiae in several landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g., Koontz v. St. Johns River Water Management District*, (U.S. Supreme Court No. 11-1447); *Arkansas Game & Fish Comm'n v.*

United States, 133 S. Ct. 511 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs, including in various cases concerning property rights. This case is of central concern to Cato because it implicates the safeguards the Fifth Amendment provides for the protection of property rights against uncompensated takings, irrespective of how they are characterized.

The National Federation of Independent Business Small Business Legal Center (NFIB) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB represents over 350,000 member businesses nationwide. Small business owners are particularly

interested in ensuring that the courts apply predictable and workable rules for evaluating takings claims because many small businesses own land and lack the financial resources to absorb substantial devaluation of their properties.

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. About one-third of NAHB's 140,000 members are home builders and remodelers, and its builder members construct about 80 percent of the new homes built each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services. Private property rights are essential to the industries represented by NAHB.

No counsel for a party authored this brief in whole or in part. No person or entity other than amicus curiae contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION

Arkansas Game & Fish Comm'n v. United States is an important, but narrow, decision. 133 S. Ct. 511, 522 (2012). The United States Supreme Court resolved a conflict in its takings case law that appeared to categorically exclude temporary

flooding from the protections of the Takings Clause. *Id.* at 519-22. The Court held that a temporary, government-induced flooding of private property *can* give rise to a compensable taking. *Id.* at 522 ("We rule today, simply and only, that government induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection."). The Court remanded this case for a determination whether several consecutive years of flooding caused by the Army Corps of Engineers' water release policies effected a temporary physical taking of the Arkansas Game & Fish Commission's property. *Id.* at 523. The purpose of this amicus brief is to refute the United States' contention that *Arkansas Game & Fish* also substantially changed the well-settled tests for adjudicating both regulatory takings claims and temporary physical takings claims. United States' Supp. Br. at 2-3, 7, 12-13.

ARGUMENT

I

THE SUPREME COURT DID NOT CHANGE THE WELL-SETTLED TEST FOR DETERMINING A PHYSICAL TAKING

Arkansas Game & Fish did not modify or overturn the well-settled test for adjudicating physical takings claims. The tests that control physical invasion takings *still* control physical takings cases, and the tests that control regulatory takings *still* only apply in regulatory takings cases. *Arkansas Game & Fish*, 133 S. Ct. at 518

(Emphasizing that it is "incumbent on courts to weigh carefully the relevant factors and circumstances in each case, *as instructed by our decisions*.") (emphasis added). Indeed, the Court confirmed the rule that when "the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Id.* at 518 (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002)). And, in specific regard to temporary physical invasions, the Court recognized that a taking will occur "when government action occurring outside the property gives rise to 'a direct and immediate interference with the enjoyment and use of the land.' " *Id.* at 519 (quoting *United States v. Causby*, 328 U.S. 256, 266 (1946)).

The federal government, however, reads one passage from *Arkansas Game & Fish* to argue that the decision implicitly overruled past takings cases to create a new multi-factor test applicable to all regulatory and temporary physical takings claims:

> We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking.
>
> Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action. So, too, are the character of the land at issue and the

> owner's "reasonable investment-backed expectations" regarding the land's use. . . . Severity of the interference figures in the calculus as well.

Arkansas Game & Fish, 133 S. Ct. at 522 (citations omitted).

If read in isolation, that second passage can be confusing. After all, it lists, without any differentiation, various tests that have been developed over the years to determine different types of takings in very different circumstances.[1] But a single passage from an opinion cannot be read out of context to create a rule that the Court did not intend: "the first rule of case law . . . interpretation is: Read on." *Id.* at 520.

And when *Arkansas Game & Fish* is read in its entirety, it is clear that the Court did not write that passage with the intention of modifying its well-established takings tests. *Id.* at 518, 521 (directing courts to follow prior takings decisions); *id.* at 522 (limiting the opinion to the question whether temporary flooding is excluded from the Takings Clause). Nor did the Court intend that the passage overrule its past

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[1] For example, the Court recites the "intent or foreseeability" test that is applied as a threshold inquiry to distinguish physical takings from torts like negligence and trespass. *Ridge Line, Inc. v. United States*, 346 F. 3d 1346, 1355-56 (Fed. Cir. 2003). The Court also references the "reasonable investment backed expectations" test developed specifically for ad hoc regulatory takings in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). The Court next refers to the "severity of the interference" inquiry, which requires substantially different analyses in the physical and regulatory contexts. *Compare Penn Central*, 438 U. S. at 130-31, *with Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, 329-30 (1922).

takings cases, including *Tahoe-Sierra* in which the Court explained that regulatory and physical takings are distinct legal theories and are therefore subject to different tests:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa.

Tahoe-Sierra, 535 U.S. at 322-23. Instead, the passage is clearly intended to illustrate the various ways in which the duration of a government interference with private property can be relevant to a takings inquiry—a point that is directly responsive to the single question decided by the Court. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, . . . and such assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions.").

II

THERE IS NO NEED TO ADOPT A NEW TEST FOR PHYSICAL TAKINGS

This Court does not need to adopt a new test to review the lower court's conclusion that several years of government-induced flooding took the Commission's

property. The well-established test for adjudicating physical takings already accounts for the duration of the invasion when determining whether or not a taking occurred. *See Arkansas Game & Fish*, 133 S. Ct. at 522 (citing *Ridge Line*, 346 F. 3d at 1355-56). Under that test, the duration of the government intrusion is considered, along with other information, to determine (1) whether the invasion is the direct cause of the injury to the property, and (2) whether the injury is substantial enough to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. *Ridge Line*, 346 F. 3d at 1355-56; *see also Causby*, 328 U.S. at 265; *Portsmouth*, 260 U.S. at 329-30.

If the injury to property is substantial, it does not matter whether the injury was caused by an invasion of limited duration. The owner's rights in his or her property are irreparably harmed because they are of a more limited and circumscribed nature than they were before the intrusion. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *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 an appropriation for the same end."). Thus, once it is shown that the government invasion directly and substantially interfered with an owner's rights in private property, the government has a categorical duty to pay just compensation. *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177-78 (1871) (When the government uses

private property in a manner that inflicts "irreparable and permanent injury to any extent," it must compensate the owner.); *Tahoe-Sierra*, 535 U.S. at 323 ("we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use").

Although the Supreme Court has, at times, used the terms "permanent" and "temporary" to distinguish physical intrusions that had taken an interest in private property from those that did not,[2] the Court has never subjected temporary physical invasions to a substantively different test than the test that applies to permanent physical invasions. *See, e.g., United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951) (five and a half month occupation of coal company effected a taking). In fact, several of the Supreme Court's "temporary" takings decisions applied the tests and principles established in the "permanent" flooding cases. In *Causby,* for example, the Supreme Court applied the rule from several "permanent" physical invasion cases to conclude that temporary military overflights interfered with the owner's ability to operate his chicken farm and effected a physical taking. 328 U.S. at 261, 265-66 (citing *Pumpelly*, 80 U.S. 166; *United States v. Lynah*, 188 U.S. 445 (1903); *United*

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[2] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419; *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924).

States v. Cress, 243 U.S. 316 (1917)).[3] The fact that the government's use of Causby's farm was limited to a number of years did not deter the Court from concluding that a compensable taking had occurred because the injury to the property was permanent and irreparable. *Causby*, 328 U.S. at 267-68 (remanding case for determination whether the government's actions took a permanent or temporary easement).

The injury sustained by Arkansas Game & Fish Commission in this case—the permanent loss of valuable timber due to several years of government-induced flooding—is no different from the harm suffered in *Causby*. Both cases involve a government intrusion upon private property that permanently deprived the owner of a valuable property interest. And both cases should be adjudicated under the same test.

CONCLUSION

Arkansas Game & Fish did not modify or overturn the well-settled test for adjudicating physical takings claims. The rules that control physical invasion takings cases *still* control physical takings cases.

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[3] *See also United States v. Petty Motor Co.*, 327 U.S. 372, 378 (1946) (citing *Welch*, 217 U.S. 333); *United States v. General Motors Corp.*, 323 U.S. 373, 378 n.5 (1945) (citing *Welch*, 217 U.S. 333).

DATED: March 27, 2013.

Respectfully submitted,

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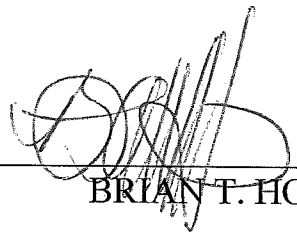
By 
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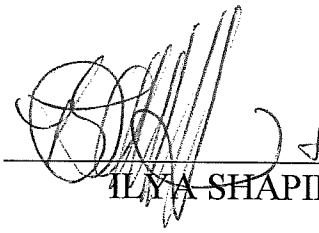
By 
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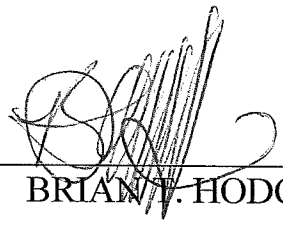
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) and 29(d), I hereby certify that the foregoing brief complies with the page limitation of Rule 29(d) in that it is half the length authorized for the Plaintiff-Cross-Appellant's principal brief on remand set out in this Court's January 29, 2013, Order setting the briefing schedule on remand.

This brief contains 2,409 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b). WordPerfect X5 was used to calculate the word count. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in proportionally-spaced typeface using WordPerfect in 14-point Times New Roman type style.



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I hereby certify that the foregoing brief was filed with the Clerk this 29 th day of March, 2013, via Federal Express. I further certify that two copies of the foregoing brief were served this day via first-class mail, postage prepaid, upon each of the following:

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