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 REPLY BRIEF ON THE MERITS


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The Commission seeks to apply the physical takings analysis, not a regulatory analysis like the *Penn Central* framework, that this Court established in flooding decisions like *Pumpelly* and *Cress* and continued to apply in a long line of flooding and nonflooding cases including *Dickinson*, *Causby*, and *Loretto*. *See* Pet. Br. 21, 26, 27, 36. The physical takings analysis in this Court's decisions looks to whether the government has taken action, the direct result of which is a physical invasion that substantially intrudes on a protected property interest. *See* Pet. Br. 26-27, 36. Where such is the character of the invasion, the Takings Clause guarantees just compensation.

Despite the United States' attempts to portray it as extreme and radical to apply this Court's physical takings analysis to both permanent *and* temporary flood invasions, the reality is that doing so is fair and faithful to precedent. The nation's entire flood control and irrigation systems cannot possibly be seen as built and functioning entirely in reliance on isolated statements in this Court's decisions in *Cress* and *Sanguinetti*. None of those systems ground to a halt when the Federal Circuit held the United States liable in 1987 for taking timber through temporary flood invasions, or when this Court found liability for temporary flood invasions in 1947. *See United States v. Dickinson*, 331 U.S. 745, 751 (1947); *United States v. Cooper*, 827 F.2d 762, 763-64 (Fed. Cir. 1987). Nor will anything like that happen here if the Federal Circuit's decision in this case is reversed, or if the Court of Federal Claims' judgment is subsequently affirmed in line with *Cooper*.

If the Federal Circuit's decision stands, the Commission will suffer the uncompensated and *permanent* change in the condition of its Management Area, the *permanent* loss of ecologically important timber and habitat, and face the future threat of further destruction. And such an exemption of government-induced flooding threatens additional bottomland hardwood ecosystems and other important land uses. The Federal Circuit's absolute exemption for temporary floods simply has no fair justification.

Nowhere in its brief does the United States acknowledge the destruction its temporary flood control actions can cause. It redirects attention to itself and inflates its concerns with new self-serving testimony from the Corps of Engineers that is not anywhere in the record, while avoiding any direct mention of the damage its flood invasions inflicted on the Commission. It abstracts the undisturbed facts and injects the argument of counsel to defend the Corps' actions. Using a classic method of defending the indefensible, the United States supplants facts with "euphemism, question-begging and sheer cloudy vagueness" so as "to name things without calling up mental pictures of them." George Orwell, *Politics and the English Language*.

In the United States' phraseology:

- The United States' flood invasions here did not permanently destroy or damage millions of board feet of timber and important wildlife habitat; the United States merely "influenced the character of the natural vegetation." *Compare* J.A. 361-98 *with* Resp. Br. at 29.

- The United States did not cause "extreme" and "substantial" flooding like its own expert testified; it caused "incrementally longer periods of flooding," or "a few additional days of flooding," or "merely a 'somewhat longer period of flooding.'" *Compare* Pet. App. 89a, 111a *and* J.A. 338-42 *with* Resp. Br. at 8, 51.

- It is not relevant to the character of the invasion that the United States' extreme and unprecedented flooding caused permanent destruction in the face of specific objections and warnings; "the character of the invasion in this context is the same whether the floodwaters arrive by natural forces or human intervention: the land floods, and the flood abates." *Compare* Pet. App. 7a-8a, 49a-50a, 88a-89a, 98a-99a, 107a-109a *and* J.A. 59-66, 123-24, 174-75, 338-42, 467-75 *with* Resp. Br. at 29.

- The United States did not make a series of related deviation releases for eight consecutive years resulting in extensive, sustained growing season flooding that caused permanent damage and destruction; the water simply originated from "natural sources" and placed a "temporary burden" on the Commission as a result of dam operations. *Compare* Pet. App. 55a-57a, 61a-62a, 88a-89a, 106a-109a *with* Resp. Br. at 30, 40.

The full, detailed, and undisturbed factual findings of the Court of Federal Claims—which this Court need not review to answer the Question Presented—establish a taking under the physical takings analysis.

## I. Applying The Physical Takings Analysis To Flood Invasions Is Fair And Faithful To Precedent, Not Extreme And Radical.

The United States offers only two reasons for exempting temporary flood invasions that would not also exempt permanent flood invasions: (1) because the law has always been this way, and (2) because holding it potentially liable for temporary flood control would destroy its ability to conduct flood control operations. *E.g.,* Resp. Br. at 16, 27. The first reason cannot be supported without inflating dicta in a few cases while deflating numerous seminal holdings discussed in the Commission's opening brief. The second reason rests on the United States' strawman argument that the Commission and supporting amici advance a physical takings test of absolute liability. In truth, neither the Commission nor supporting amici advance any such absolute rule, and instead seek to apply the settled physical takings analysis that has been applied to all modes of invasion without slowing the wheels of government.

### A. There is no long-standing, absolute rule that exempts temporary flood control actions from the Takings Clause.

To articulate a bright-line, categorical rule that absolutely exempts temporary flood control actions from the Takings Clause, the United States inflates isolated statements in *Cress*, *Sanguinetti*, and *Loretto* to subsume those cases' actual holdings. It then represents that it, lower courts, and Congress have always relied on those statements as definitively and forever exempting temporary flooding from the Takings

Clause. That view of the law is not tenable, as numerous cases have advised. Notably, the United States does not even acknowledge the Federal Circuit case that Judge Newman described as "binding precedent that directly contravenes" the panel majority's decision; *Cooper* awarded compensation for taking timber through increased seasonal flooding caused by a temporary (never meant to be permanent) stream blockage. *See* Pet. App. 35a (Newman, J., dissenting) (citing 827 F.2d at 763-64). The United States was on notice before its deviations began in 1993 that temporary flood control actions are not exempt from the Takings Clause. *See Cooper*, 827 F.2d at 764; *see also 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 governmental projects, which we have held not to be takings, is, of course, not a clear and definite guideline.")

*Cooper* is fully in line with this Court's precedents. Multiple times this Court has rejected an absolute rule that flooding which can be, or is, abated is exempt from the Takings Clause. *E.g.*, *Dickinson*, 331 U.S. at 751 (the temporary duration of the invasion did not defeat the takings claim even though the affected land had been reclaimed by the landowner prior to filing the claim). Indeed, that principle is consistent even in the authority that the United States cites to the contrary. *See, e.g.*, *United States v. Welch*, 217 U.S. 333, 339 (1910) (the government's flooding actions would still amount to a taking even if it ended the flooding because "a destruction for public purposes may as well be a taking as would an appropriation for the same

end"). *Cooper* is also faithful to this Court's seminal Takings Clause decisions in *Armstrong* and *Causby*. *See Armstrong v. United States*, 364 U.S. 40, 48 (1960); *United States v. Causby*, 328 U.S. 256, 258-59 (1946).

Although it offers new testimony from the Corps of Engineers—which is outside the record on appeal—that it does not acquire flowage easements for temporary floods (*see* Resp. Br. at 26), the United States has indeed acquired flowage easements downstream of flood control projects that it intends to use only in extreme flood events, if ever. *Compare Story v. Marsh*, 732 F.2d 1375, 1378, 1384 (8th Cir. 1984) (describing the Corps of Engineers' purchase of flowage easements below a levee system so that it could breach the levee if the Mississippi River reached a certain level) *with Big Oaks Farms, Inc. v. United States*, No. 1:11-CV-00275-NBF, slip op. at 15 (Fed. Cl. May 4, 2012) (citing the Federal Circuit's decision in this case and dismissing landowners' takings claim that the flooding from the Corps's 2011 breach of the levee system exceeded its flowage easements and caused permanent damage because "plaintiffs' claim is based on a single flood that has since receded").

The Court of Federal Claims' trial judgment for the Commission does not detract from this Court's decisions in *Cress*, *Sanguinetti*, or *Loretto*. Those cases continue to stand for important rules. *Cress* holds that flooding which is shown to be inevitably recurring is a taking; the fact that such flooding may not be a permanent occupation both temporally and spatially is "no difference in kind, but only of degree." *Cress v. United States*, 243 U.S. 316, 328 (1917). The United States' attempt to expand the phrase "inevitably

recurring overflows" is unpersuasive as the phrase does not mean that flood invasions must be permanent in duration to warrant compensation. *See* Wash. Legal Found. et al. Amicus Br. at 13-14 (noting that *Webster's New Collegiate Dictionary* defines "inevitable" as "incapable of being avoided or evaded" and does not refer to events that will recur for all time). Rather than foreclose the possibility of temporary flood takings, the Court in *Cress* acknowledged the now-settled physical takings test as the proper means for determining whether a taking has occurred, stating "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines whether it is a taking." *Cress*, 243 U.S. at 328.

*Sanguinetti* continues to stand for the rule that a landowner cannot prevail on a flood-based takings claim without proving its damages, causation, or forseeability. *Sanguinetti v. United States*, 264 U.S. 146, 149-50 (1924). That being the basis for the Court's holding, any reference in *Sanguinetti* to the duration of the flooding is mere dicta. *See* Pet. Br. at 18; Cert. Reply Br. at 4-5. And unlike here where the recurring and sustained flooding was attributable to affirmative water releases during normal operating conditions—the deviations—any additional flooding there was speculative and, if anything, attributable to an insufficient canal despite the government's efforts to over-engineer it. *Sanguinetti*, 264 U.S. at 146-47.

*Loretto* establishes the rule that permanent occupation, no matter how small, will always effect a taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) ("Our holding today is

narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking."). *Loretto* never articulated an absolute rule that temporary flooding cannot result in a taking. In fact, though ignored by the United States, the Court in *Loretto* stated that interim flooding cases are subject to a "more complex balancing test." *Id.* at 435 n.12; *see also* Pet. Reply Br. *infra* at 17. The lengths to which the United States is forced to go to cobble together what is clearly dicta, especially given that the *Loretto* and *Cress* plaintiffs prevailed, to support its proposed rule underscores the fact that neither this Court nor—until now—the Federal Circuit has exempted temporary floods from the Takings Clause.

### B. The physical takings test does not require the United States to pay just compensation for every temporary flood.

None of this Court's decisions applying physical takings law have held or suggested that the government effects a taking any time water enters someone's property. Nor has the Commission or any supporting amici argued for an absolute "per se rule that any flooding result[ing] from the operation of a government project is a taking." Resp. Br. at 39. Instead, the physical takings analysis in this Court's decisions holds the government liable when it takes actions, the direct result of which are flood invasions that substantially intrude on a protected property interest. *See* Pet. Br. at 26; *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1356 (Fed. Cir. 2003) (distinguishing between direct invasions and consequential damages by asking whether the floods are "the direct, natural, or probable result" of the

government action*); cf. also* Pac. Legal Found. et al. Amicus Br. at 20; Wash. Legal Found. et al. Amicus Br. at 16-17; Nat'l Fed. of Indep. Bus. et al. Amicus Br. at 17; Wolfsen Land & Cattle Co. et al. Amicus Br. at 28; Owners' Counsel of America Amicus Br. at 4-5.

A number of invasions, including floods, that might be traced to a government action do not satisfy this test:

- Flood damage from unprecedented rains that caused a government-constructed canal to overflow did not effect a taking because there was no proof that the value of the flooded property was impaired, that the overflow was the direct or necessary result of the canal, or that the flooding could reasonably be anticipated by the government. *Sanguinetti*, 264 U.S. at 149-50.

- Erosion damage that may have been less if revetments had not been constructed on river banks to prevent the navigable channel of the Mississippi River from receding did not constitute a taking because the object of the works was to preserve natural conditions and the damage was not the direct result of government action but was caused by the river's action over a course of years. *Bedford v. United States*, 192 U.S. 217, 225 (1904).

- Two guns that were test-fired from a fort battery over private property without impacting the land did not entitle the landowner to recovery under the Takings Clause because there was no

proof that the guns would ever be fired again. *Peabody v. United States*, 231 U.S. 530, 540 (1913); *see also Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U.S. 1, 1 (1919).

- Damage to fruit trees was not the foreseeable result of government drilling four miles from the plaintiff's spring that 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 its salty condition. *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 711 (Ct. Cl. 1955).

If the Federal Circuit on remand were to apply the physical takings analysis and ultimately affirm the Court of Federal Claims' judgment for the Commission, it would not at all mean that the United States must suddenly pay just compensation for every overflow of water that it is alleged to have caused. The Commission's case does not involve only trivial and unconnected floods like the United States' brief presents. For example, the United States characterizes "the size of the effect of the Corps' operational decisions" here as only adding a few days per month to the already flooded Management Area. Resp. Br. at 9-10. But this abstraction sterilizes the data and does not reflect the evidence at trial that the timing, extent, and duration of the flooding was unique, unprecedented, and did not emulate historical conditions. J.A. 83-84, 123-24, 174-75, 338-42, 435, 438-39, 460-64, 470-71, 472, 475, 485-86.

Flooding during the entire 1993-1999 growing seasons (April - October) resulted in an 89.5% increase in water levels on the Management Area of 8' to 10.5' and a 47.6% increase in levels over 11.5' as compared to the 1981-1992 period. J.A. 479-80. During the hottest months (June - September) in that same period, these levels saw an increase of 122.79% and 100%, respectively. J.A. 479-80. Both parties' experts agreed that the cumulative effect of multiple, consecutive years of growing-season flooding creates a problem. J.A. 111-13, 175, 332. The United States' own expert, Dr. Sammy King, testified that the Corps' deviations here, as expressed under the Corps' own model, did result in multiple consecutive years of "extreme" flooding because it lasted longer and occurred during some of the hottest months. J.A. 338-42. This flooding left in its wake an ecosystem in a state of collapse with tree mortality of 15-60% in the tracts affected by the flooding, as compared to an average annual mortality of less than 2% before the deviations. J.A. 113-14, 384; Pet. App. 137a. On the Part I study area, 104,119 of the 198,596 trees were dead or declining when Kingwood Forestry Services conducted its timber inventory at the end of 2000. *See* Pl. Exh. 485 at AGFC11549, Tr. 2368.

The United States' brief also mischaracterizes its deviations as "ad hoc," "independent," "temporary," and "discrete" decisions (*see, e.g.*, Resp. Br. at 12, 33-34) made "in response to *different* requests . . . for *different* times of the year . . . for *different* water releases to target *different* river stages at Poplar Bluff." Resp. Br. at 6 (emphasis added). In truth, the Corps' actions amounted to a "series of deviations" that resulted in a unique "pattern" of increased flooding on the

Management Area. Pet. App. 48a, 107a. The United States also rationalizes that the deviations all fall under the category of "planned deviations" as contemplated in the Clearwater Lake Water Control Manual "for specific activities that required deviations only for limited periods of time, such as the harvesting of crops, canoe races, and fish spawning." Resp. Br. at 6.

However, nearly all of the planned deviations adopted by the Corps between 1993 and 2000 were for considerable time periods and effectively extended the "deviating" throughout eight consecutive years.[1] Written authorizations for some of the "interim operating plans" indicate that the Corps was using these to "monitor the effectiveness" of the continued deviations to help it develop a permanent revision to the water control plan. *C.f.* Jt. Exh. 210, 215, 218, 236, 239. The common effect of these deviations was "controlled flooding" to an unprecedented and destructive degree across major portions of the Commission's Management Area. *See* J.A. 56, 404-15. The Corps admitted that the primary reason for these deviations and its efforts to permanently modify the

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[1] *See* Jt. Exh. 210-13, Tr. 368 (approving deviations from April 15, 1994 through April 15, 1995); Jt. Exh. 215-16, Tr. 368 (approving deviations from April 15, 1995 through April 15, 1996); Jt. Exh. 218-22, Tr. 368 (approving deviations from April 15, 1996 through April 14, 1997); Jt. Exh. 232-34, Tr. 368 (approving deviations from April 15, 1997 through "end of FY 97"); Jt. Exh. 236-37, 239-44, Tr. 368 (approving deviations from April 15, 1998 through Dec. 1, 1998); Jt. Exh. 246-47, Tr. 368 (approving deviations from Dec. 1, 1998 through Dec. 31, 1999); Jt. Exh. 248-53, Tr. 368 (approving deviations from May 15, 2000 through Dec. 1, 2000).

Clearwater Lake Water Control Manual was to benefit farmers who were planting low-lying acreage below Clearwater Dam. JA 351, 489, 687; *see* Pet. App. 48a.[2]

These undisturbed facts differ from those presented in *Sanguinetti*, *Bedford, Portsmouth*, and *Columbia Basin Orchard* on dispositive points. The Corps' pattern of deviations here caused significantly greater than normal flooding, not trivial flooding, that was foreseeable as the direct, natural, or probable result of the deviations, and that substantially intruded on the Commission's property interest.

### C. The Court's physical takings test has not brought the wheels of government to a halt.

Raising the specter of a total collapse of the nation's flood control systems, the United States argues that "any retreat from that [permanent vs. temporary] distinction could be highly disruptive." *See* Resp. Br. at 27. Going further, it argues that the Takings Clause would force a "blind adherence to normal operating plans" and "cast in doubt the future of the

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[2] The evidence at trial showed that several members of Congress requested deviations on behalf of farmers and that the Corps felt that returning to normal operations would be difficult and perhaps "not an option" because of "political pressure." *See* Jt. Exh. 5, Tr. 1253-54; Jt. Exh. 240, 241; Tr. 1256; Pet. App. 185a, 189a. Notably, the American Farm Bureau Federation and numerous agricultural landowners have filed amici curiae briefs supporting the Commission's claim for just compensation. *See* Nat'l Fed. of Indep. Bus., et al. Amicus Curiae Br.; Wolfsen Land & Cattle Co. et al. Amicus Curiae Br.

government's long-running . . . programs of flood control (and other water management)." *See* Resp. Br. at 28. Such fears are wildly overblown; they have been raised in the past and rejected without crippling the government's ability to function.

In *Loretto*, the Court considered and rejected argument that applying the permanent physical occupation rule would have "dire consequences for the government's power to adjust landlord-tenant relationships." *Loretto*, 458 U.S. at 440. In *Causby*, the Court considered that treating every overflight as an invasion "would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim." 328 U.S. at 261. It rejected those concerns as a reason to categorically exempt overflights. Since *Causby* was decided in 1946, the nation's system of air travel and temporary changes in flight patterns have in no way collapsed. In *Portsmouth*, the Court held that military guns could take property by shooting *over* someone's property. *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922). Even without a single shot ever landing on the owner's property, "a continuance of them in sufficient number and for a sufficient time" could effect a taking. *Id.* After *Portsmouth* was decided in 1922, the Takings Clause did not hamstring the nation's ability to provide for the common defense. The United States' flood control operations did not collapse after the Federal Circuit decided *Cooper* in 1987, and they will not collapse if the Court of Federal Claims' judgment here is affirmed on remand.

The United States' own brief explains that procedural laws like the National Environmental Policy Act ("NEPA") will tend to ensure that the government follows permanent flood control policies (*e.g.*, Resp. Br. at 21-22; Opp. Br. at 18).[3] Thus if the United States' contentions about laws like NEPA are actually true, then applying the Takings Clause here in line with settled precedent would be fair and just for landowners situated like the Commission without bringing the wheels of government to a halt.

## II. Applying A Regulatory Takings Analysis To Flood Invasions Would Be A Dramatic Change Undercutting The Whole Body Of Physical Takings Law.

Replacing the physical takings analysis with a *Penn Central* regulatory analysis for the temporary flood invasions proven at trial would be an unprecedented shift with dangerous implications. A regulatory

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[3] Here, NEPA had no such effect. The Corps chose not to implement NEPA until after 5 years of deviations. As early as 1993, Corps officials were pursuing a "Plan of Action" to develop water control changes to the White and Black Rivers. *See* Jt. Exh. 211, 222; Pl. Exh. 266, Tr. 86-87. But the Corps did not prepare a draft Environmental Assessment until late 1999. Jt. Exh. 14, Tr. 204; Pl. Exh. 70, Tr. 202; *see also* 40 C.F.R.§ 1502.5 (requiring agencies to begin a draft environmental impact statement "early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made"). Colonel Thomas Holden, the District Engineer and highest ranking official in the Little Rock District, ultimately admitted that "anyone could challenge us in that the deviations are not in compliance with NEPA and enjoin us." Pet. App. 188a.

analysis is far more deferential to government interests, which is surely why the United States argues it here for the first time. *See* R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731, 735 & n.30 (2011); *see also* Pet. Br. at 42. Regardless of whether the *Penn Central* analysis is the best way to preserve and respect the rights guaranteed in the Takings Clause when the government regulates property from afar, this Court has squarely said, in no uncertain terms, that it does not apply to physical takings:

> 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. . . . [W]e do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use.

*Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002); *see also Loretto*, 458 U.S. at 431-32 & n.10; *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

As described above (Pet. Reply Br. *supra* at 1, 8), the Commission seeks to apply the established physical takings analysis like the Court of Federal Claims did. To be clear, the Commission has never advocated for a regulatory takings analysis in this case. *See, e.g.*, Pet. 15-16; Pet. Br. 25-26, 33. Under the physical takings

analysis, where the character of the invasion amounts to a flood that results directly, naturally, or probably from a government action and substantially intrudes on a protected property interest, the Takings Clause guarantees just compensation. Pet. Br. at 21.

### A. Flood invasions have always been recognized physical invasions that necessarily raise special concerns compared to regulatory interferences.

Flood invasions have always been considered physical invasions. The Court's entire body of takings law began with a flooding case in 1871. *See Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871); *see also Tahoe-Sierra*, 535 U.S. at 322 ("Our jurisprudence involving condemnations and physical takings is as old as the Republic . . . . Our regulatory takings jurisprudence, in contrast, is of more recent vintage."). Regulatory takings, which the United States' amici deride as nothing but a "judicial invention," were not recognized until 1920. *See* Int'l Mun. Lawyers Ass'n, et al. Amicus Br. at 21; *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). While *Loretto* referenced a "complex balancing test" in the intermittent flooding cases, it decidedly was not *Penn Central* balancing because they were all decided decades before *Penn Central*. *See Loretto*, 458 U.S. at 428, 436 n.12; *Penn Central*, 438 U.S. 104.

The Court has long considered physical invasions to be intrusions of "unusually serious character" that "for the most part, involve[] the straightforward application of *per se* rules." *Loretto*, 458 U.S. at 427; *see also Tahoe-Sierra*, 535 U.S. at 322; *First English*

*Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 329 (Stevens, J., dissenting). Physical invasions are much more likely to effect a taking because they necessarily injure two of the most fiercely guarded property rights: the rights to exclude and to use and enjoy property. *See Loretto*, 458 U.S. at 433, 439 n.17; *Causby*, 328 U.S. at 265; *Pumpelly*, 80 U.S. at 179 (citing a serious interruption to the use and enjoyment of property); *see also* Nat'l Fed'n of Indep. Bus. et al. Amicus Br. at 14-15.

Floods that are imposed by government action are actual physical invasions and have always been analyzed as such. *E.g.*, *Cress*, 243 U.S. at 328; *Pumpelly*, 80 U.S. at 179. The principles applied in those decisions informed the war-time cases that the United States argues (Resp. Br. at 32) are wholly inapplicable in this flooding context. *E.g.*, *United States v. General Motors*, 323 U.S. 373, 378 & n.5 (1945) (citing *Welch*, 217 U.S. 333); *see also Loretto*, 458 U.S. at 428 (explaining that in an earlier case the Court "applied the principles enunciated in *Pumpelly*" to find that placing telegraph poles constituted a taking even though they did not occupy the entire property).

Regulatory interferences, however, do not necessarily intrude upon those rights. Instead, they typically inflict only "economic" injuries. *E.g.*, *Tahoe-Sierra*, 535 U.S. at 322-23; *Penn Central*, 438 U.S. at 124. Or they may limit *future* uses of property as in *Penn Central* where the building owners could still continue using the property as they were before the city rejected their plans to add-on. *Id.* at 136. It is in *those* situations where this Court noted that it had "been unable to develop any 'set formula' for determining

when 'justice and fairness' require that *economic injuries* caused by public action be compensated . . . ." *Id.* at 124 (emphasis added). It would thus be a drastic change to apply *Penn Central* or any other body of regulatory takings law to flooding cases like the United States seeks. *Compare* Resp. Br. at 38 *with Tahoe-Sierra*, 535 U.S. at 323.

### B. Applying a regulatory analysis to flood invasions that effect a physical taking would undermine the entire body of physical takings law.

To make a regulatory analysis seem appropriate here, the United States reinvents the undisturbed facts to make its flood invasions seem indirect and the Commission's injury seem small. But on the evidence introduced at trial, the Court of Federal Claims specifically found that the Corps' deviations increased flooding in the Management Area, the effect of deviations was predictable, the deviations "so profoundly disrupted certain regions of the Management Area that the Commission could no longer use those regions for their intended purposes (providing habitat for wildlife and timber for harvest)," and the increased flooding during the growing seasons "to an extent not experienced previously" resulted in increased mortality on the Management Area. Pet. App. 88a, 92a, 99a, 107a, 122a. At trial, the United States did not offer evidence of the general benefits of flood control to the public, or even to the Commission. Nor did it argue anything about Arkansas' law of water-use rights, or that downstream landowners are subject to a completely different body of takings law than upstream landowners.

The United States' rationales for changing the law here would unravel this Court's historic physical takings doctrine. First, no case has ever held that anything less than a permanent and complete physical occupation is subject to a *Penn Central* analysis like the United States argues. *See* Resp. Br. at 40. That rationale would overrule *Cress* where the flooding was intermittent. *See* 243 U.S. at 328. Instead, *Cress* applied the physical takings analysis to floods that were "inevitably recurring" and found that they constituted a taking. *Id*. at 327-28. Even "[i]f any substantial enjoyment of the land still remains," the Court would not consider anything about the public benefits of the government's actions like the United States argues is a relevant factor here. *Compare id. with* Resp. Br. at 44.

Second, the United States' rationale that floodwater is not "an occupation by the government," with only "the *possible* exception of backwater that can be regarded as part of the project," (Resp. Br. at 40) (emphasis added) would upend *Pumpelly*, 80 U.S at 179-80 (where permanent flooding by backwater was held to be an occupation), *Ridge Line, Inc.*, 346 F.3d at 1356 (where the Federal Circuit described a physical takings analysis for run-off caused by a government building upland from the plaintiff), and even *Causby*, 328 U.S. at 265-66 (where damages by noise and light from passing airplanes "were not merely consequential, but the product of a direct invasion"). Floodwater was, in fact, the very thing that started this Court's entire physical takings doctrine. *See Pumpelly*, 80 U.S. at 179 (warning against construing the Takings Clause so narrowly as to deny just compensation for flooding that

imposes "a serious interruption to the common and necessary use of property").

Third, the United States' rationale that something as "complex as downstream flooding" cannot constitute a physical invasion (Resp. Br. at 41) would encourage it to ignore the impacts of its own actions. The government is fully capable of assessing the downstream impacts of its flood control actions. *E.g.*, Pet. App. 99a ("In short, the effect of deviations in the Management Area was predictable, using readily available resources and hydrologic skills."). The United States itself admits that it buys flowage easements for "substantially downstream" operations. *See* Resp. Br. at 26. And it even argues not only that it *can* predict flooding impacts, but that it *will* by following NEPA when it changes its flood control policies. *See* Resp. Br. at 21-22. There is no reason to view downstream floods as legally incapable of being the direct result of a government action.

Fourth, the United States' rationale that its flood control actions do nothing but adjust the benefits and burdens of life in a floodplain (*see* Resp. Br. at 44) undermines the fundamental rights that the physical takings doctrine has protected since 1871. The rights to exclude others, especially the government, and to continue to use and enjoy property are fiercely guarded property rights and "cannot be so easily manipulated." *See Loretto*, 458 U.S. at 439 & n.17. Notably, the United States cites no authority where a landowner claiming a taking of property has had to prove that her burdens outweigh the "aggregate benefits" of a government action to the general public. *See* Resp. Br. at 44. *Miller v. Schoene* is no support for the United

States' position here because (a) no one disputes whether the United States *could* flood the Commission's property (the Commission argues only that, when it has done so, it must pay just compensation), and (b) the Commission's timber and habitat were not a threat to the public like the destroyed trees in *Miller*. *Cf.* 276 U.S. 272, 278, 280 (1928).

Weighing the benefits and burdens like the United States requests would be especially unfair. Accurately and fairly measuring the benefits of a regulatory action is often dubious at best. Framed like the United States wants, no landowner would ever have a right to compensation because it would have to prove that its burdens outweigh the abstract benefits of a regulation to the entire public. "The applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments . . . . Nor can the vindication of those rights depend on the expense in doing so." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 (Brennan, J., et al., dissenting); *see also City of Van Buren v. United States*, 697 F.2d 1058, 1062 (Fed. Cir. 1983) ("[I]t is appropriate to emphasize here, where the government denies that any taking at all occurred, that only benefits inuring to the condemnee, rather than the community at large, are relevant . . . .").

The Takings Clause should not become such an "instrument of oppression rather than protection to individual rights." *Pumpelly*, 80 U.S. at 179. Rather than backslide from the historic protections outlined in its physical takings decisions, the Court should confirm them.

## CONCLUSION

The Court should reverse and remand with instructions for the Federal Circuit to apply the correct physical takings analysis.

Respectfully Submitted,

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