No. 11-597

In the
Supreme Court of the United States

ARKANSAS GAME & FISH COMMISSION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION AND CATO INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether government actions that result in intermittent flooding over a period of eight years can give rise to a claim for damages under the Takings Clause.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation and the Cato Institute submit this brief amicus curiae in support of Petitioner Arkansas Game & Fish Commission (AGFC).[1]

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 has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys participated as lead counsel in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and participated as amicus curiae in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). Because of its history and experience with regard to issues affecting private property, PLF

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[1] All parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

believes that its perspective will aid this Court in considering AGFC's petition.

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.

SUMMARY OF ARGUMENT

AGFC's petition for a writ of certiorari raises an important issue concerning the protections provided by the Takings Clause of the Fifth Amendment of the U.S. Constitution. Specifically, the petition asks whether a government decision that results in the repeated flooding of private property should be given different treatment under the Takings Clause than any other temporary taking. It should not. In *First English Evangelical Lutheran Church v. County of Los Angeles*, this Court surveyed its body of takings case law to determine that a temporary regulatory policy—just like a temporary physical invasion of private property—can rise to the level of a taking requiring just compensation. 482 U.S. 304, 318 (1987). *First English* explained that there was no reason to treat

temporary takings differently under the Fifth Amendment.

Temporary takings, like perpetual takings, take an interest in property. *First English*, 482 U.S. at 318 ("'Temporary' takings . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation."). The only difference is that a temporary taking puts private property to public use for a limited period of time. *Id.* This distinction, however, does not change the fact that a taking has occurred. *Id.* Thus, the only relevance that the duration of the government interference has in a takings claim is in measuring how much compensation is due. *Id.* Notwithstanding *First English* and all of the case law cited therein, however, the Federal Circuit below held that temporary flooding of private property can *never* constitute a taking if the physical invasion is the result of an ad hoc or temporary government policy. *Arkansas Game & Fish Commission v. United States*, 637 F.3d 1366, 1374, 1377-78 (Fed. Cir. 2011).

The Federal Circuit's decision is particularly objectionable—and particularly appropriate for review—because it departs from this Court's takings precedent by elevating the intent underlying a government policy to the single determinative factor in a temporary takings case. If left unreviewed, this ruling will provide a roadmap for government agencies to circumvent the protections of the Fifth Amendment by simply designating any policies that expose private property to increased risk of flood as "ad hoc," "interim," or "temporary." Amici urge this Court to grant AGFC's petition to resolve the conflicts created by the Federal Circuit's decision and to reaffirm the principle that the Fifth Amendment obligates the

government to pay just compensation for a temporary physical invasion of private property, regardless of the government's intent. This Court's reasoning in *First English* applies to all temporary takings, including temporary flood invasions caused by the government's ad hoc or temporary policies.

ARGUMENT

THE FEDERAL CIRCUIT'S ADOPTION OF A RULE THAT EXEMPTS FLOODING CAUSED BY TEMPORARY GOVERNMENT POLICIES FROM THE PROTECTIONS OF THE FIFTH AMENDMENT CONFLICTS WITH DECISIONS OF THIS COURT

The reason why the Federal Circuit's decision creates so many conflicts with this Court's takings precedent is that the lower court focused on the underlying intent of the government policy—rather than the character of the physical invasion itself[2]—to determine whether the government-induced flooding rose to the level of a taking. *Arkansas Game & Fish Commission*, 637 F.3d at 1377. The government's expectations when adopting a harmful policy cannot determine whether a taking has occurred. The Takings Clause of the Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The obligation to pay just compensation arises the moment the government acts in a manner that subjugates a

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[2] *See United States v. Cress*, 243 U.S. 316, 328 (1917) ("[I]t 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.").

property owner's rights in his or her land. *First English*, 482 U.S. at 320 n.10; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 435-37 (1982) (when the government causes a physical invasion or occupation of private property, it is categorically liable for just compensation). In the context of a physical invasion taking, the government's liability exists without regard to the reason for the invasion or the circumstances under which the property was acquired.[3] *See Loretto*, 458 U.S. at 426 (public purpose irrelevant); *Preseault v. United States*, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (expectations not considered in physical invasion case). And just compensation for a taking must be made regardless of whether the interference continues for a period of months, years, or indefinitely. *See*, *e.g.*, *United States v. Dow*, 357 U.S. 17, 18-19 (1958); *International Paper Co. v. United States*, 282 U.S. 399, 407-08 (1931). Simply put, where the government has taken private 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 Federal Circuit's decision upsets this Court's precedents regarding temporary takings (and property

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[3] It is well recognized that government-induced flooding that physically invades and occupies private property effects a taking and requires just compensation under the Takings Clause. *See Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 180-81 (1871); *see also Danforth v. United States*, 308 U.S. 271, 277-80 (1939); *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924); *United States v. Cress*, 243 U.S. at 327-28. And in *United States v. Dickinson*, this Court recognized that government-induced flooding does not have to be a permanent condition of the land to rise to the level of a taking. 331 U.S. 745, 750-51 (1947).

owners' expectations) in two regards. First, the Federal Circuit held that flooding cases are so different from other types of takings that *First English*, and the cases cited therein, do not apply. *Arkansas Game & Fish Commission*, 637 F.3d at 1374. Second, the Federal Circuit held that the government's expectation that its policy be "ad hoc or temporary" means that any resulting physical invasion of private property can never result in a taking:

> [I]n determining whether a governmental decision to release water from a dam can result in a taking, we must distinguish between action which is by its nature temporary and that which is permanent. But in distinguishing between temporary and permanent action, we do not focus on a structure and its consequence. *Rather we must focus on whether the government flood control policy was a permanent or temporary policy*. Releases that are ad hoc or temporary cannot, by their very nature, be inevitably recurring [and therefore cannot constitute a taking].

Arkansas Game & Fish Commission, 637 F.3d at 1377 (emphasis added). Both conclusions warrant review by this Court.

A. A Flood Invasion Is Not Meaningfully Different from Other Physical Invasions

The Federal Circuit's conclusion that government-induced flooding is different from other types of physical invasions finds no support in takings case law. The sole basis for the lower court's conclusion was

that, when faced with an inverse condemnation suit based on flooding, courts must make the initial determination whether the claim alleges a tort or a taking.[4] *Arkansas Game & Fish Commission*, 637 F.3d at 1374. This inquiry, however, does not set flooding cases apart from any other type of physical invasion. Indeed, both the Federal Circuit and Federal Court of Claims regularly apply the tort/takings test to a wide range of claims alleging physical invasion takings.[5] *See*, *e.g.*, *Cary v. United States*, 552 F.3d 1373, 1376-77 (Fed. Cir. 2009) (fire suppression policies); *Moden v. United States*, 404 F.3d 1335, 1342 (Fed. Cir. 2005) (exposing property to chemical contaminant); *Placer Mining Co. v. United States*, 98 Fed. Cl. 681, 687-88 (2011) (channel construction that caused mine

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[4] The Federal Circuit has developed a test to distinguish torts from takings in physical invasion cases. The test requires the court to consider the nature of the government's action and other relevant information to determine (1) whether the government intended to invade a protected property interest or whether the asserted invasion was the direct, natural, or probable result of government activity, and (2) whether the interference was substantial and frequent enough to rise to the level of a taking. *See*, *e.g., Cary v. United States*, 552 F.3d at 1376-77; *Moden v. United States*, 404 F.3d at 1342; *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1356 (Fed. Cir. 2003).

[5] The question whether a government action constituted a tort or a taking is a jurisdictional question, not a substantive part of the takings analysis. *Hansen v. United States*, 65 Fed. Cl. 76, 95 (2005); *Lockheed Martin Corp. v. United States*, 50 Fed. Cl. 550, 553 (2001), *aff'd*, 48 Fed. Appx. 752 (Fed. Cir. 2002). The test is intended to determine whether a federal district court or the Court of Federal Claims has subject matter jurisdiction. A tort claim against the government must be brought in the federal district courts (28 U.S.C. § 1346(b)); whereas, a taking claim seeking compensation must usually be filed in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491.

entrance to collapse); *Kam-Almaz v. United States*, 96 Fed. Cl. 84, 89 (2011) (seizure of laptop computer); *Banks v. United States*, 88 Fed. Cl. 665, 685-86 (2009) (erosion caused by government project). The Federal Circuit's decision to create a substantively different constitutional test for flooding cases finds no support in case law and warrants review by this Court.

B. The Government's Intent That Its Actions Be "Ad Hoc or Temporary" Is Not Determinative of Whether a Taking Has Occurred

The Federal Circuit's conclusion that "ad hoc or temporary" policies "by their very nature" can never give rise to a taking creates significant conflicts with this Court's takings case law. *Arkansas Game & Fish Commission*, 637 F.3d at 1377. The lower court was aware that it was creating a conflict when it created an exception to this Court's general rule that "if particular government action would constitute a taking when permanently continued, temporary action of the same nature may lead to a temporary takings claim." *Id.* at 1374 (citing *First English*, 482 U.S. at 328). Government-induced flooding undisputably falls within the realm of government actions that will constitute a taking if permanently continued. *See*, *e.g.*, *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) at 180-81; *Danforth v. United States*, 308 U.S. at 277-80; *Sanguinetti v. United States*, 264 U.S. at 149; *United States v. Cress*, 243 U.S. at 327-28. Under *First English*, therefore, temporary government-induced flooding *can* give rise to a temporary takings claim. This conflict alone warrants review.

But the conflicts created by the Federal Circuit's decision are not limited to *First English*. For nearly a century, this Court has held the government liable for temporary takings based on temporary policies. The most obvious examples of temporary takings are found in the wartime seizure cases cited in *First English*. 482 U.S. at 318 (citing *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3-4, 7, 16 (1949) (government commandeered laundry plant for less than four years, was required to pay rental value for occupied period of time plus depreciation and value of lost trade routes); *United States v. Petty Motor Co.*, 327 U.S. 372, 374, 380-81 (1946) (government compensated leaseholders for the temporary taking of their leaseholds for period of over two-and-a-half years); *United States v. General Motors Corp.*, 323 U.S. 373, 375 (1945) (government required to pay short-term rental value for taking portion of a building that had been leased by an automobile parts company)). There are additional decisions from this Court that confirm the viability of temporary takings claims. In *International Paper Co. v. United States*, for example, the United States, during World War I, issued a requisition order that allowed a third party's power plant to draw the whole of a river's water flow. 282 U.S. at 404-06, 408. At that time, International Paper leased a mill that had a right to use water drawn from the river via a canal. *Id.* at 404-05. Acting under the government's order, the third party power company stopped water from flowing into International Paper's canal, which interrupted International Paper's operation for a period of just over ten months. *Id.* at 405-06. This Court held that the government's decision to authorize the power company to interrupt the water flow effected

a physical taking requiring the payment of just compensation. *Id.* at 407.

In *United States v. Causby*, the government was issued a one-year lease with six-month renewals to use an airport for military purposes. 328 U.S. 256, 258-59 (1946). The term of the lease was for a total of five years (1942-1947), or until the end of World War II, whichever was earlier. *Id.* Operation of the airport, however, resulted in the frequent overflight of Causby's neighboring home and chicken farm. *Id.* at 259. The noise and glare caused by heavy, four-engine bombers, transports, and squads of fighters so interfered with the use and enjoyment of Causby's property and the commercial viability of the chicken farm, that this Court held that the government had taken an easement for which just compensation was due. *Id.* at 268. The fact that the taking may have been temporary did not change this Court's conclusion. *Id.* The duration of the taking was a matter to be resolved on remand when considering how much compensation was due. *Id.*

The decision below is so anomalous as to conflict even with earlier Federal Circuit decisions that applied *First English* to confirm the viability of temporary physical invasion takings claims. In *Hendler v. United States*, the Federal Circuit held that the duration of a physical invasion is not relevant to the question whether a taking has occurred. 952 F.2d 1364, 1376 (Fed. Cir. 1991); *see also Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1582-83 (Fed. Cir. 1993) (holding that the duration of a physical occupation is only relevant to the question of how much compensation is due). The *Hendler* court explained that the duration of a government act cannot be

determinative of whether a taking has occurred because every action is potentially temporary: "[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." *Hendler*, 952 F.3d at 1376. *Hendler* held that a physical invasion that substantially interferes with a landowner's rights in his or her property may constitute a taking, regardless of whether the occupation lasts for a period of years or is indefinite:

> In [the physical takings] context, 'permanent' does not mean forever, or anything like it. A taking can be for a limited term—what is 'taken' is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute.

Id. ("[N]o one would argue that [the temporary nature of a physical occupation] would somehow absolve the government of its liability for a taking during the time the property was denied to the property owner."). Given the body of case law recognizing the viability of a temporary takings claim, it is not surprising that the decision below conflicts with multiple decisions from this Court and the Federal Circuit. *See*, *e.g.*, *United States v. Dickinson*, 331 U.S. at 751 (government must pay just compensation for land that it flooded, even though the property owner had reclaimed most of the land prior to initiating the lawsuit); *Ridge Line, Inc. v. United States*, 346 F.3d at 1354-55 (reversing and remanding dismissal of flood invasion takings claim even though the landowner made improvement to his property that abated the flooding); *Cooper v. United*

States, 827 F.2d 762, 763-64 (Fed. Cir. 1987) (finding a taking even though the U.S. Army Corps of Engineers remedied the flooding after five years).

Among takings actions, it is possible that temporary, government-induced floods of a severity sufficient to trigger the just compensation requirement may be rare, but they do *in fact* occur. *Id.* Creating a rule that removes all temporary flood invasions resulting from ad hoc or temporary government policies from the protections of the Takings Clause is both unnecessary and overly broad. The Federal Circuit's novel rule does distinguish those flood invasions that sound in tort from those that effect a taking. *Arkansas Game & Fish Commission*, 637 F.3d at 1374. But, the rule still broadly excuses the government from its obligation to compensate landowners for temporary takings based solely on the government's characterization of its actions as "ad hoc," "temporary," or "interim." *Id.* at 1377. This Court should take review of this case to resolve the conflicts created by the Federal Circuit's decision.

CONCLUSION

It is indisputable that an ad hoc or interim government policy can harm private property just like any other policy. This includes policies that result in the temporary flooding of private land. This Court should grant AGFC's petition in order to reverse the

creation of a rule that exempts all such harms from the Fifth Amendment's just compensation requirement.

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Respectfully submitted,

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