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

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

ILYA SHAPIRO
Cato Institute
1000 Massachusetts Ave., NW
Washington, DC 20001
Telephone: (202) 842-0200
ishapiro@cato.org

MARTIN S. KAUFMAN
Atlantic Legal Foundation
2039 Palmer Avenue
Suite 104
Larchmont, NY 10538
Telephone: (914) 834-3322
mskaufman@atlanticlegal.org

R. S. RADFORD
*BRIAN T. HODGES
**Counsel of Record*
Pacific Legal Foundation
10940 NE 33rd Place,
Suite 210
Bellevue, WA 98004
Telephone: (425) 567-0484
Facsimile: (425) 576-9565
rsr@pacificlegal.org
bth@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, Cato Institute, and Atlantic Legal Foundation

QUESTION PRESENTED

Whether government actions that cause recurring floods that damage private property must be permanent in order to require payment of just compensation under the Takings Clause of the Fifth Amendment?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

Statutes

Constitution

Rules

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF AMICI CURIAE[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 *Sackett v. EPA*, 132 S. Ct. 1367 (2012), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. Cal. Coastal Comm'n*, 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 believes that its perspective will aid this Court in considering the arguments of the parties.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

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 Atlantic Legal Foundation (ALF) is a nonprofit, nonpartisan public interest law firm. It provides legal representation, without fee, to scientists, parents, educators, other individuals, small businesses, and trade associations. ALF's mission is to advance the rule of law in courts and before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. ALF's leadership includes distinguished legal scholars and practitioners from across the legal community. ALF has served as counsel for plaintiffs and amici in numerous takings cases, including *Cole v. Santa Barbara County*, 537 U.S. 973 (2002) (counsel for amici associations of small property owners in support of petition for certiorari in challenge to a state law procedural bar to claims for unconstitutional takings based on ripeness); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (counsel for real property owners' associations as amici in challenge to development moratoria); *Brody v. Vill. of Port Chester*,

345 F.3d 103 (2d Cir. 2003) (co-counsel for plaintiff in challenge to taking of property for nonpublic use and inadequate notice of final decision to condemn under due process requirements of Fourteenth Amendment); and *Blecher v. Dep't of Hous. Pres. & Dev. of the City of New York*, S.D.N.Y. 92 Civ. 8760 (CSH) (1992) (counsel for small residential property owners in Fourteenth Amendment challenge to New York City Senior Citizen Rent Increase Exemption).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks whether the Fifth Amendment's Takings Clause obligates the government to pay just compensation when it causes a river to flood private property for several years and, during that time, uses the land in a manner that destroys valuable property, permanently depriving the landowner of its use.

This Court has repeatedly recognized that a temporary physical invasion can give rise to a taking. *See*, *e.g.*, *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *States v. Causby*, 328 U.S. 256, 266-68 (1946). This recognition is based on the fundamental principle that the government must compensate a landowner to the extent that it actually invades private property, thereby exercising dominion over the landowner's rights and inflicting irreparable harm thereto. *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177-78 (1872).

The test for a physical taking is whether the government's invasion directly interferes with the landowner's rights to possess, use, or dispose of his or her property. *Causby*, 328 U.S. at 266 ("[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."). A temporary invasion that causes substantial harm to the property is no different in kind than a permanent invasion; both have the effect of depriving an owner of his or her rights in the land. *United States v. Cress*, 243 U.S. 316, 328 (1917). And both require compensation. *Id.*

Petitioner Arkansas Game & Fish Commission (Commission) owns thousands of acres of hardwood forest in Arkansas' Upper Mississippi Alluvial Valley. Pet. Cert. App. A at 3a. This forest provides a variety of valuable uses, including the harvest of mature oak trees, recreational lands, hunting grounds for migratory water fowl, and conservation and habitat areas. Pet. Cert. App. B at 42a-44a.[2] Much of this land, and its use, was significantly damaged when the U.S. Army Corps of Engineers (Army Corps) employed a series of water management plans from 1993 to 2000 that caused six consecutive years of flooding and degraded nearly 18 million board feet of timber across about 23,000 acres of forest. Pet. Cert. App. A at 14a-15a; Pet. Cert. App. B at 40a, 140a-142a.

The Court of Federal Claims found that, during these floods, 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

---

[2] Because it decided the case as a matter of law, the Federal Circuit chose not to address the Court of Federal Claims' findings of fact. Pet. Cert. App. A at 22a ("we need not decide whether the flooding on the Management Area was sufficiently substantial to justify a takings remedy or the predicable result of the government's action") (quotation marks and citation omitted).

harvest." Pet. Cert. App. B at 92a. Although the Army Corps eventually stopped flooding the forest, the trial court concluded that "the damage done to the Commission's property interest in its timber was permanent . . . and the Commission was preempted from exercising its property rights over its timber during and after the Corp's deviations." Pet. Cert. App. B at 91a, 129a ("the government's temporary taking of a flowage easement over the Management Area resulted in a permanent taking of timber from that property"). The Court of Federal Claims concluded that the Army Corps' actions effected a taking and ordered the Corps to pay $5.5 million for the value of the timber destroyed by the floods, plus an additional $176,428.34 to restore the severely damaged portions of the Commission's recreation and conservation lands. Pet. Cert. App. A at 17a; Pet. Cert. App. B at 142a, 158a.

But, in a 2-1 decision, the Federal Circuit reversed the trial court's judgment, concluding that, as a matter of law, government flooding of private property can *never* constitute a taking if it was the result of an "ad hoc or temporary" government policy because, according to the court of appeals, temporary flooding can never give rise to a taking. Pet. Cert. App. A at 23a, 27a. Therefore, the majority reasoned, it was unnecessary to consider the extent to which the Army Corps' actions interfered with the Commission rights in its property. *Id.*

The Federal Circuit went too far when it adopted a *per se* rule that an "ad hoc or temporary" policy resulting in recurring floods can never, "by its very nature," result in a taking. *Id.* That rule is

inconsistent with long-standing precedent of this Court and the Federal Circuit's own precedents.

Amici curiae urge this Court to reverse the Federal Circuit's decision and reaffirm that a physical invasion of private property by the government that directly interferes with the landowner's rights constitutes a physical taking for which just compensation must be paid.

ARGUMENT

I

A PHYSICAL INVASION THAT DEPRIVES A LANDOWNER OF HIS OR HER PROPERTY RIGHTS CONSTITUTES A TAKING REGARDLESS OF ITS DURATION OR METHOD OF INVASION

The term "property" refers to the collection of protected rights inhering in an individual's relationship to his or her land or chattels. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Among these are the rights to possess, use, exclude others, and dispose of the property. *Id.* A government act that physically interferes with private property in a manner that substantially interferes with one of these rights constitutes a taking for which just compensation is due. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 435 (1982); U.S. Const. amend. V (Private property shall not "be taken for public use, without just compensation.").

This Court's categorical treatment of physical takings follows from the very nature of property rights. The right to exclude others—which is coextensive with the rights of use and possession—is an essential

quality of property. Thus, to the extent the government physically invades or occupies one's land, it destroys all of the essential rights thereto and constitutes a taking. *Loretto*, 458 U.S. at 426, 435 ("'[T]he character of the government action' not only is an important factor in resolving whether the action works a [physical] taking but also is determinative."); *see also Lingle*, 544 U.S. at 539 (A physical invasion will always effect a taking because it eviscerates the owner's right to exclude others from entering upon and using his or her property which is "perhaps the most fundamental of all property interests.").

This rule holds true whether the government's physical interference appropriates a fee simple or an easement for a term of years. *General Motors*, 323 U.S. at 378. Although the owner in the latter instance may still hold *some* valuable rights in the land, those rights are irreparably harmed because they are of a more limited and circumscribed nature than they were before the intrusion. *Id.* The Takings Clause requires just compensation in both circumstances. *Id.*

Cases involving government-induced flooding are no different. When the government causes a river to overflow private property in a manner that directly interferes with the landowner's rights to possess, use, exclude others, or dispose of his or her property, it appropriates a flowage easement over the land and its actions constitute a taking for which compensation is due. *Pumpelly*, 80 U.S. at 181; *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627 (1961). This is true whether or not the flooding is eventually abated. *See*, *e.g.*, *United States v. Dickinson*, 331 U.S. 745, 750-51 (1947) (flooding for a limited period of years effected a taking); *United States v. Lynah*, 188

U.S. 445, 470 (1903) (flooding resulted in a taking despite the fact that the floods could be abated and land reclaimed). That is because it is the character of the government action—whether it interferes with the owner's rights in the land—that determines whether a taking has occurred. *See*, *e.g.*, *Causby*, 328 U.S. at 266-68; *Loretto*, 458 U.S. at 426.

A. The Duration of a Physical Invasion Does Not Determine Whether a Taking Has Occurred

Although this Court has, at times, used the terms "permanent" and "temporary" to distinguish those physical intrusions that take an interest in private property from those that do not, *Loretto*, 458 U.S. at 427-28, its case law plainly demonstrates that, for the purpose of determining takings liability, there is no meaningful distinction between a physical invasion that continues in perpetuity and one that is limited in duration.[3] *See*, *e.g.*, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (" '[T]emporary' takings . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation."); *id.* at 331-32 (Stevens, J., dissenting) (The proposition "that there is no distinction between temporary and permanent takings" is well-recognized in the context of physical takings; "the state certainly

[3] Indeed, even though *Loretto* used the term "permanent" to describe the physical occupation, *i.e.*, installation of a cable box, the statute at issue only required landlords to permit cable companies to install facilities on their properties for a limited and readily determinable period of time. *See Loretto*, 458 U.S. at 421, 439 (The statute provided for a physical occupation for "[s]o long as the property remain[ed] residential and a [cable] company wishe[d] to retain the installation.").

may not occupy an individual's home for a month and then escape compensation by leaving and declaring the occupation 'temporary.'"). Indeed, the test articulated in *Loretto* for determining physical takings relied on several cases in which this Court recognized that even short-term physical invasions or occupations can effect a taking. *Loretto*, 458 U.S. at 430-31, 435 (citing *Pewee Coal*, 341 U.S. 114; *Causby*, 328 U.S. 256; *General Motors*, 323 U.S. 373).

In *Pewee Coal*, the federal government "possessed and operated" the property of a coal mining company for five-and-a-half months in order to prevent a nationwide miners' strike in the middle of World War II. 341 U.S. at 115. The Court unanimously agreed that the government's seizure was a taking, with no regard to the limited duration of the occupation. *Id.* (plurality); *id.* at 119 (Reed, J., concurring); *id.* at 121-22 (Burton, J., dissenting). References to the "temporary" nature of the government's possession were considered only in the context of the amount of compensation due to the plaintiff. *See*, *e.g.*, *id.* at 117 (plurality). Other wartime seizure cases confirm the principle that short-term occupations can effect a categorical taking. *See 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); *General Motors*, 323 U.S. at 375 (government required to pay short-term rental value for taking portion of a building that had been leased by an

automobile parts company for a period of one year); *Int'l Paper Co. v. United States*, 282 U.S. 399, 407-08 (1931) (government order authorizing a third party to draw the whole of a river's water flow for a period of ten months effected a physical taking of a paper mill's water rights requiring just compensation).

Perhaps the best known temporary invasion case is *Causby*, 328 U.S. 256, where this Court concluded that the noise and glare from military overflights effected a physical taking when they caused a farmer's chickens to panic and die. In that case, the government was issued a one-year lease with an option for annual renewals to use an airport for military purposes. *Id.* at 258-59. The term of the lease was for a total of five years (1942-1947), or until six months after the end of World War II, whichever was earlier. *Id.* Operation of the airport resulted in the frequent overflight of Causby's 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 his farm that this Court held that the government had physically taken an easement for which just compensation was due. *Id.* at 268. The fact that the government's fly-over of Causby's property was of limited duration did not deter this Court from concluding that a compensable taking had occurred. *Id.*

This Court reaffirmed the principles set out in *Causby* and the wartime seizure cases in *First English*, where it surveyed its takings case law to determine that a temporary regulatory policy—just like a temporary physical invasion—can rise to the level of a

taking.[4] 482 U.S. at 316-18. *First English* concluded that the only meaningful difference between a permanent and temporary taking was 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.* In such circumstances, the duration of the government interference is only relevant to the question of how much compensation is due. *Id.*; *see also General Motors*, 323 U.S. at 378; *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1582-83 (Fed. Cir. 1993) (duration of a taking is only relevant to the question of how much compensation is due); *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) (duration of a physical invasion is not relevant to the question whether a taking has occurred).

This Court's precedents conclusively establish that the amount of time that the government is present on private property does not determine whether the harm is permanent, and, therefore termination of occupation cannot, as a matter of law, negate the existence of a taking. *See*, *e.g.*, Professor Steven J. Eagle, *Regulatory Takings* at Ch. 7, § 9(f) (4th ed. 2009) (when the government causes a physical invasion of private property for a limited period of time, it imposes a servitude on the land for the duration of the time it is put to public use, then, when the property is relinquished, the government exercises the appropriated right of alienation in order to return the

[4] Similarly, in *Lingle* and *Tahoe-Sierra*, this Court cited its temporary physical invasion cases as "paradigmatic" and "categorical" examples of takings for which compensation must be paid. *Lingle*, 544 U.S. at 537 (citing *Pewee Coal*, 341 U.S. 114; *General Motors*, 323 U.S. 373); *Tahoe-Sierra Pres. Council*, 535 U.S. at 322 (citing *Pewee Coal* and *General Motors*).

property in its permanently diminished state to the owner); *see also* John J. Constonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. Rev. 465, 543-46 (1983) (surveying this Court's physical takings cases and concluding that temporary physical invasions can constitute a taking); Professor Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 U. Tol. L. Rev. 281, 293 (1993) ("While the Court has distinguished between 'temporary physical invasions' and 'permanent physical occupations,' after [*First English*], even temporary physical invasions may be per se takings, requiring just compensation for the time the property is occupied."). This fact is well-recognized by legal scholars:

> [P]ermanency for doctrinal purposes is not synonymous with permanency in a temporal sense. Rather, it is a label attached to property interference of a sufficiently severe nature. Thus, in developing its [physical] takings doctrine, the Supreme Court has focused on the quality, not the duration of invasion. This was true in early cases and more recent cases. The Court has even viewed interference with limited term leaseholds as a compensable taking. Occassional, periodic, or intermittent occupations can also fall within the rule. In contrast, an isolated, or technical trespass has been viewed as a temporary invasion. Indeed, the Court's latest land use decisions reject any literal distinction between temporary and permanent interferences as

> determinative in either regulatory or [physical] takings cases.

Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis. L. Rev. 925, 993-94.

> It almost goes without saying that "when the Court speaks in terms of a permanent physical occupation, it does not necessarily mean that the occupation is one which will last forever." [. . .]
>
> The term "permanent" is really the Court's shorthand way of describing which physical occupations, because of the character of the occupation, have a sufficiently severe effect on the property owner such that no public interest can outweigh the impact on the property owner. Thus, no further inquiry into the purpose of the governmental action is necessary. The temporal character of the invasion is a relevant consideration, but not controlling.

Steven Daren Blevit, *A Tale of Two Amendments: Property Rights and Takings in the Context of Environmental Surveillance*, 68 S. Cal. L. Rev. 885, 905-06 (1995) (quoting *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1544 (11th Cir. 1985), *rev'd on other grounds*, 480 U.S. 245 (1987)). The Federal Circuit's conclusion that a physical invasion must continue indefinitely before compensation is due is incorrect and should be reversed.

B. Government-Induced Flooding Is Subject to the Same Substantive Rules as Other Physical Takings

This Court's flooding cases, just like its other physical taking cases, recognize that any invasion of private property can result in a taking, regardless of whether the intrusion is permanent, intermittent, or temporary in duration. All physical takings cases are guided by the principle that when the government uses private property in a manner that inflicts "irreparable and permanent injury *to any extent*," it must compensate the owner. *Pumpelly*, 80 U.S. at 177-78 (emphasis added). In specific regard to flooding, this Court has held that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, . . . so as to effectively destroy or impair its usefulness, it is a taking." *Id.* at 181; *see also Lynah*, 188 U.S. at 470 ("Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment."). This test is no different than the test adopted in *Loretto* in that it simply asks whether the government flooding directly caused "a serious interruption to the common and necessary use of property." *Pumpelly*, 80 U.S. at 179; *see also Loretto*, 458 U.S. at 426. If the answer is "yes," then a taking has occurred. *See Cress*, 243 U.S. at 328 ("[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 of whether it is a taking."); *see also* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev 1393, 1464 (1991) (flooding that infringes on private

property is a classic example of government action that is appropriative in nature).

This Court has consistently applied this test to find a taking whenever government-caused flooding directly interferes with a landowner's rights in his or her property, regardless of the duration of the intrusion. In *Lynah*, for example, the Court found a that a permanent physical taking occurred when the government placed dams, training walls, and other obstructions in a river in a manner that caused the water level to rise and partially inundate the plaintiffs' land. 188 U.S. at 468. Even though much of the flooding could be prevented and portions of the land reclaimed in the future, the fact remained that the government's actions made the property unfit for its current agricultural uses thereby substantially destroying its value and effecting a taking. *Id.* at 469-70, 474. This Court reiterated that point in *United States v. Welch*, where it explained that, if the government had caused flood waters to enter and destroy private property, then stopped the flooding, its actions would still amount to a taking.[5] 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.").

In *Dickinson*, this Court found that flooding constituted a taking even though the affected land had been reclaimed prior to the takings claim being filed. 331 U.S. at 750-51. In that case, the government constructed a dam as part of a project to improve river

[5] Two of the wartime seizure cases relied on *Welch* for the rule that the government's temporary occupation and use of private property effected a taking for which compensation is required. *See Petty Motor*, 327 U.S. at 378; *General Motors*, 323 U.S. at 378 n.5.

navigability. *Id.* at 746-47. The dam caused the water level to rise and flood the plaintiffs' land. *Id.* Within five years, the plaintiff had reclaimed most of his land from the flooding. *Id.* at 750-51. *Dickinson* concluded that, by subjecting the property to flooding, the government had exercised dominion over the land and, therefore, appropriated an easement for which just compensation was due. *Id.* at 750. The temporary duration of the government's invasion did not defeat the takings claim. *Dickinson* reasoned that, for the period of time the land was under water, the government had acquired the property: "no use to which Dickinson could subsequently put the property by his reclamation efforts changed the fact that the land was taken when it was taken and an obligation to pay for it then arose." *Id.* at 751.

Shortly after this Court issued its decision in *Pumpelly*, the New Hampshire Supreme Court decided *Eaton v. Boston, Concord & Montreal R.R.*, 51 N.H. 504 (1872), which is notable because the court elaborated on the type of flood-related injury that will give rise to a taking. In *Eaton*, a railroad company, acting pursuant to a state statute, removed a natural flood barrier while constructing tracks, which resulted in the occasional flooding of Eaton's farmland. *Id.* at 507. The railroad argued that the flooding did not rise to the level of a taking because it was temporary and the resulting damages were, therefore, too consequential. *Id.* at 513. The court rejected this argument, noting that the impact was not a "mere personal inconvenience or annoyance" but involved "physical injury to the land itself, a physical interference with property rights, and actual disturbance of the plaintiff's possession." *Id.* The court reasoned that "occasional innundation may produce the same effect

in preventing the plaintiff from making a beneficial use of the land as would be caused by a manual asportation of the constituent materials of the soil." *Id.*; *see also id.* at 512 ("Taking of a part is as much forbidden by the constitution as taking the whole. The difference is only one of degree; the quantum of interest may vary, but the principle is the same.") (internal quotation marks and citation omitted). Thus, the court concluded that "[c]overing the land with water . . . is a serious interruption of plaintiff's right to use it in the ordinary manner" and effected a taking. *Id.* at 513-14 ("To turn a stream of water on to a plaintiff's premises is as marked an infringement of his proprietary rights as it would be for the defendants to go upon the premises in person and dig a ditch, or deposit upon them a mound of earth.") (internal quotation marks and citation omitted). This Court favorably cited *Eaton* in *Lynah*, 188 U.S. at 472; *Gibson v. United States*, 166 U.S. 269, 276 (1897); and *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879).

Here, the Court of Federal Claims similarly determined that the Army Corps' water release policies directly resulted in recurring flooding of the Commission's land, which substantially interfered with the Commission's ability to make productive use of its forest lands and permanently destroyed its interest in its valuable timber. Pet. Cert. App. B at 91a-92a. These injuries are not qualitatively different from those suffered in *Causby*, *Lynah*, or *Dickinson* in that they directly and irreparably impacted the Commission's right to the customary and valuable use of its property. And they are a far cry from the type of minor intrusions or nominal harm that are only recoverable, if at all, in a tort claim. *See Loretto*, 458 U.S. at 428-29 (Explaining that the Takings Clause

does not provide compensation for minor and passing intrusions like an "ordinary traveller [sic], whether on foot or in a vehicle, pass[ing] to and fro along the streets, and his use and occupation therefore are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by another traveller.") (quoting *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 98-99 (1893)); *see also Eaton*, 51 N.H. at 525-26 (the type of temporary intrusion that will not give rise to a taking is one where there is only a "temporary trespass," such as a person crossing a lawn or an engineer surveying the land, resulting only in nominal damages such that the land is not subjected to a servitude and the beneficial possession of the owner is not substantially interfered with). The Federal Circuit's conclusion that government-caused flooding can never give rise to a taking if it is limited in its temporal duration is incorrect and should be reversed.

II

THE "CHARACTER OF THE INVASION"—NOT THE GOVERNMENT'S INTENT—WILL DETERMINE A TAKING

The key question posed by this case is how a court evaluates a temporary physical invasion claim. The decisions discussed above hold that the "character of the invasion" will be determinative of whether a taking has occurred. *Causby*, 328 U.S. at 266; *Loretto*, 458 U.S. at 426. In other words, when a landowner alleges a physical taking, the court must determine whether the government caused a physical invasion of private property that interfered with the owner's rights to use, possess, exclude others, or dispose of the property. *See Causby*, 328 U.S. at 266-68; *Lynah*, 188 U.S. at 470. In

its decision below, however, the Federal Circuit concluded that the Army Corps' intent that its water release policies be "ad hoc or temporary" was determinative of the Commission's taking claim without considering the trial court's findings that the flooding: (1) was readily foreseeable (Pet. Cert. App. B at 94a-99a); (2) directly interfered with the Commission's use of its land (Pet. Cert. App. B at 91a-92a, 100a-102a, 104a-128a); and (3) destroyed millions of dollars worth of valuable hardwood timber (Pet. Cert. App. B at 91a-92a, 140a-142a):

> [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].

Pet. Cert. App. A at 23a (emphasis added). The Federal Circuit's conclusion that the government's intent will determine a taking finds no support in this Court's case law and should be reversed.

A. The "Character of the Invasion" Test Is Sufficient to Take the Duration of the Government Invasion Into Consideration

In a flooding case, just like any other physical taking cases, it is the character of the government act that determines whether the invasion constitutes a taking. *Cress*, 243 U.S. at 328; *Causby*, 328 U.S. at 266; *Loretto*, 458 U.S. at 426. This inquiry allows the court to consider the actual impact that temporary flooding has on the property owner's rights in order to determine the extent to which the invasion constitutes an exercise of dominion over the land and therefore a taking. Take, for example, the consolidated cases decided in *Cress*, 243 U.S. 316: in that case, the federal government's construction and maintenance of locks and dams on the Kentucky and Cumberland Rivers caused the rivers and their tributaries to back up and intermittently overflow a portion of one plaintiff's property and interfere with another plaintiff's operation of a mill. 243 U.S. at 318-19, 327. The Court found that the periodic intrusions appropriated an easement because, during periods of overflow, the government's actions directly and substantially interfered with each landowner's rights to make valuable use of his property. *Id.* at 329-30. The Court concluded that, although intermittent, the "character of the invasion" was a physical intrusion that directly interfered with the landowner's rights to possess, use, exclude others, or dispose of his property. *Id.* at 328, 330. The only substantive difference that the Court found between permanent and temporary flooding is that, in the latter circumstance, the landowner may retain possession of his land and the government is obligated to compensate the owner for

the value of the easement taken. *Id.* at 329 ("If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial, instead of a total, devastating of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent domain.").

By contrast, in *Sanguinetti v. United States*, this Court applied the "character of the invasion" test to find no taking where the landowner was unable to show that increased flooding interfered with his use of his land. 264 U.S. 146, 150 (1924). In that case, the government constructed a diversion canal intended to protect downstream properties from seasonal flooding. Sanguinetti's land, nonetheless, was repeatedly inundated during a period of record-setting rains and flooding. Sanguinetti sued claiming that the canal project effected a taking by exposing his land to increased flooding. Distinguishing *Cress*, the *Sanguinetti* Court explained that "in order to create an enforceable liability against the government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property." *Id.* Sanguinetti, however, failed to show that the canal project caused increased flooding on his property or that his land was "overflowed for such a length of time in any year as to prevent its use for agricultural purposes."[6] *Id.* at 147, 149. As a result, the Court determined that there was no "permanent impairment

[6] *See also Bedford v. United States*, 192 U.S. 217, 225 (1904) (holding that no taking occurred when landowner was unable to prove that flooding was the direct result of a government project upstream).

of value" and no appropriation of Sanguinetti's land. *Id.* at 149.

The "character of the invasion" test effectively distinguishes takings from nontakings in other contexts as well. *See*, *e.g.*, *Causby*, 328 U.S. at 266-68; *Loretto*, 458 U.S. at 426. Over the years, the lower courts have developed a test for determining the "character of the invasion" in physical takings 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 (this first prong is disjunctive), and (2) whether the interference was substantial enough to rise to the level of a taking.[7] *See*, *e.g.*, *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1356 (Fed. Cir. 2003). This test has been applied to a wide range of claims alleging a physical invasion taking.[8] But, most importantly, the lower courts, including the trial court in this case, have applied this test to find that flooding of a limited duration effected a taking. *See* Pet. Cert. App. B at 81a-86a (analysis of property interest at issue); *id.* at 86a-104a (analysis of

---

[7] For an exhaustive history of this test, see *Hansen v. United States*, 65 Fed. Cl. 76, 95-119 (2005).

[8] *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 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 character of the invasion); *id.* at 104a-128a (analysis of causation); *see also Ridge Line*, 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). When applied properly, this test follows this Court's direction that the "character of the invasion" be determinative of whether a taking has occurred.

The decision below radically departs from this Court's precedents by elevating the government's intent to the sole determinative factor in a takings case. Pet. Cert. App. A at 23a, 27a. As a result, the Federal Circuit concluded that it was not required to consider the impact that the government-caused flooding had on the Commission's rights in its land. *Id.* at 22a-23a. Without evaluating the extent to which the Army Corps' flooding impacted the Commission's rights to use, possess, exclude others, or dispose of its property, however, it was impossible for the Federal Circuit to determine whether or not a taking occurred—which is another reason why its decision should be reversed.

B. The Government's Intent Is Irrelevant Where the "Character of the Invasion" Is a Taking

There is simply no basis in this Court's modern takings law[9] to require a plaintiff to prove that the government acted with an appropriative intent when it physically invades or occupies private property. *See* Alan Romero, *Takings by Floodwaters*, 76 N.D. L. Rev. 785, 815 (2000) ("When the government causes water to invade private land, the government's inanimate agent physically enters and occupies the land . . . . It makes no difference that . . . the government might not have intended to take the land."). In such circumstances, the government's liability exists without regard to the reason for the invasion or the circumstances under which the property was acquired. *See Loretto*, 458 U.S. at 426 (public purpose irrelevant); *Tahoe-Sierra*, 535 U.S. at 323) (same); *see also*

---

[9] Some early takings cases (*e.g.*, *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922)) discuss the government's intent as a basis for finding takings liability. These cases, however, arise from a period of time when the Court of Claims lacked the authority to consider direct constitutional claims. *Hansen*, 65 Fed. Cl. at 106 n.41 (citing Act of February 24, 1855, ch. 122, 10 Stat. 612 (1855)). As a result, the court considered takings claims as claims for assumpsit based on a breach of implied contract theory. *See id.* at 107 (citing cases). A plaintiff asserting a claim under implied contract theory argued that the Takings Clause constituted a governmental promise to compensate property owners for damage to his or her private property. *See id.* at 107-08. Thus, the early takings cases from this period extended the takings inquiry to consider intent as a distinguishing characteristic of compensable takings under an implied contract theory. *See Klebe v. United States*, 263 U.S. 188, 191-92 (1923); *United States v. N. Am. Transp. & Trading Co.*, 253 U.S. 330, 333-34 (1920); *Tempel v. United States*, 248 U.S. 121, 130-31 (1918).

Preseault v. United States, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (expectations not considered in physical invasion case); *see also Hansen v. United States*, 65 Fed. Cl. 76, 81 (2005) (The Takings Clause "contains no state of mind requirement.").

According to the Federal Circuit, however, its evaluation of the Army Corps' intent was necessary to determine, as a threshold matter, whether the Commission's lawsuit alleges harm that is recoverable under a tort theory. Pet. Cert. App. A at 23a, 27a. The Federal Circuit held that this determination would prove dispositive of a takings claim, obviating the need to evaluate the character of the invasion, because, according to the lower court, harm recoverable under a tort theory can never be recovered under the Takings Clause. *Id.* at 22a-23a, 27a. In reality, this analysis is of little value because every government act that involves an invasion or destruction of property is, by definition, tortious. *See*, *e.g.*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 715 (1999) (A taking claim is analogous to a tort in that it alleges an interference with property interest.); *Richards v. Washington Terminal Co.*, 233 U.S. 546, 551 (1914) ("[I]t is sufficiently obvious that the acts done by defendant, if done without legislative sanction, would form the subject of an action by plaintiff to recover damages as for a private nuisance."); *Pumpelly*, 80 U.S. at 166, 176-77 (a flood invasion is analogous to a claim for trespass on the case).[10] Consequently, the

[10] *See also Palm v. United States*, 835 F. Supp. 512, 516 (N.D. Cal. 1993) (The "cluster of facts that constitute a claim for an unconstitutional taking and those that indicate the torts of nuisance or trespass are similar in many respects. Both situations involve situations of unlawful entry onto an owner's property or (continued...)

identification of a possible tort, standing alone, is an insufficient basis upon which to conclude whether or not a taking occurred. *See Dickinson*, 331 U.S. at 750 (holding that the government had to compensate the owner for the value of the easement taken as well as for all consequential damages occurring during floods). As discussed above, the court must still determine whether the government invasion directly and substantially impacted the owner's rights, which is the sole determinative inquiry in a physical takings case. *Causby*, 328 U.S. at 266-68; *Cress*, 243 U.S. at 328.

The Federal Circuit's adoption of a threshold test that operates to circumvent any meaningful analysis of the merits of a takings plaintiff's case conflicts with the purpose of the Takings Clause. The Takings Clause is designed "to preserve practical and substantial rights" that individuals have in their property. *Dickinson*, 331 U.S. at 748-49. That purpose is not served when the lower courts develop procedures designed to dispose of otherwise meritorious takings claims. *Id.* (noting the danger of dismissing a legitimate takings claim based on the "shifting meanings" derived from tort theories); *see also Boyd v. United States*, 116 U.S. 616, 635 (1885) ("Illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."); *Eaton*, 51

[10] (...continued)
infringement of an owner's right to use and enjoyment of her property."); *Clark v. United States*, 19 Cl. Ct. 220, 222-23 (1990) ("There is no analytical inconsistency between tort and takings theories. Both a tort and taking can be made out of the same set of operative facts.").

N.H. at 520-21 ("We are not to suppose that the framers of the constitution meant to entangle their meaning in the mazes of the refined and technical distinctions by which the common law system of forms of action is perplexed and incumbered.").

Given the diverse circumstances under which a taking can occur, it is impossible to draw a bright line rule stating that a physical invasion can never effect a taking if the harm resulting from it could theoretically be recovered in a tort action. *Dickinson*, 331 U.S. at 749. Such a rule would be over broad and would result in meritorious claims being dismissed. Indeed, by drawing such a line in this case, the Federal Circuit left the Commission in the untenable position of having to suffer repeated flood invasions and significant injuries to its land and property without any means to recover for any of the harm inflicted by the government acts because the Army Corps enjoys immunity from tort claims arising from its water release policies under the Flood Control Act of 1928, 33 U.S.C. § 702c. This Court should reject the Federal Circuit's adoption of an intent-based threshold test for a physical takings claim.

C. There Is No Need to Develop an Ad Hoc Balancing Test for Physical Invasions of Limited Duration

Given the demonstrated flexibility and functionality of the "character of the invasion" test, there is no need for this Court to develop a "more complex balancing test" for temporary physical invasion cases. *See Loretto*, 458 U.S. at 435 n.12. Indeed, none of the parties has suggested such a test.

Nonetheless, this Court could, in its decision here, resolve confusion arising from its discussion of flooding cases in *Loretto*. 458 U.S. at 428, 435 n.12. *Loretto* generally summarized this Court's flooding cases as follows: "this Court has consistently distinguished between flooding cases involving permanent physical occupation, on the one hand, and cases involving a more temporary invasion [. . .] on the other. A taking has always been found only in the former situation." *Id.* at 428 (internal citations omitted). Then, in a footnote discussing the viability of temporary physical taking claims, the Court noted that it had subjected its interim flooding cases (presumably, *Cress*, 243 U.S. 316, and *Sanguinetti*, 264 U.S. 146) to "a more complex balancing test." *Loretto*, 458 U.S. at 435 n.12.

Some commentators suggest that footnote 12 may stand for the proposition that temporary physical invasions are to be adjudicated under the multi-factorial, ad hoc test developed in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).[11] That suggestion, however, was put to rest in *Tahoe-Sierra*, where this Court explained that *Penn Central* does not apply to a physical taking case. *Tahoe-Sierra*, 535 U.S. at 322-23 ("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

---

[11] *See, e.g.*, Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 362-63 (2007); Marcus J. Lock, *Braving the Waters of Supreme Court Takings Jurisprudence: Will the Fifth Amendment Protect Western Water Rights From Federal Regulation?*, 4 U. Denv. Water L. Rev. 76, 90 (2000); Dennis H. Long, *Note: The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportunity for New Directions in Takings Law*, 72 Ind. L.J. 1185, 1194 (1997).

treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking' and vice versa."); *see also id.* at 323 ("we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically viable use").

Nor is there any basis in this Court's flooding cases to develop a different test for temporary flooding. Indeed, *Dickinson*, *Welch*, and *Lynah* demonstrate that this Court has found a taking where the duration of the flood was finite, and, therefore the invasion itself is a temporary condition. *Dickinson*, 331 U.S. at 750-51; *Welch*, 217 U.S. at 339; *Lynah*, 188 U.S. at 469-70, 474. Moreover, *Cress* did not involve a balancing test; it established the rule that the "character of the invasion" is determinative of a physical taking case. 243 U.S. at 328; *see also Sanguinetti*, 264 U.S. at 147-49 (applying the *Cress* "character of invasion" test). And this Court relied on the rules and principles developed in its flooding cases to hold that the temporary physical invasions at issue in the wartime seizure cases and *Causby* effected takings. *See Petty Motor*, 327 U.S. at 378 (citing *Welch*, 217 U.S. 333, for the rule that the government's temporary occupation and use of private property effected a taking for which compensation is required); *General Motors*, 323 U.S. at 378 n.5 (same); *Causby*, 328 U.S. at 261 n.6, 266 (citing *Dickinson*, 331 U.S. 745; *Cress*, 243 U.S. 316; *Welch*, 217 U.S. 333; *Lynah*, 188 U.S. 445; *Pumpelly*, 80 U.S. 166). Indeed, the principles established by this

Court's flooding cases are so universal that they supplied the basis for this Court to recognize the viability of a claim for a temporary regulatory taking. *First English*, 482 U.S. at 316-18 (relying on *Pumpelly*, 80 U.S. at 177-78).

There is no reason, therefore, to treat temporary flooding differently than other physical invasions; both are subject to the same test recognized in *Loretto* and *Causby*.

CONCLUSION

The Federal Circuit's rule—which removes all temporary flood invasions resulting from ad hoc or temporary government policies from the protections of the Takings Clause—is unnecessary and over broad. For nearly a century, this Court has held that the "character of the invasion" will determine when a temporary invasion rises to the level of a taking. There is no reason to depart from this rule. This Court should reverse the Federal Circuit's decision and reaffirm the principle that the government's physical invasion of private property constitutes a physical taking requiring just compensation when it directly

interferes with the landowner's rights to possess, use, exclude others, or dispose of his or her property.

DATED: July, 2012.

Respectfully submitted,

ILYA SHAPIRO
Cato Institute
1000 Massachusetts Ave., NW
Washington, DC 20001
Telephone: (202) 842-0200
ishapiro@cato.org

MARTIN S. KAUFMAN
Atlantic Legal Foundation
2039 Palmer Avenue
Suite 104
Larchmont, NY 10538
Telephone: (914) 834-3322
mskaufman@atlanticlegal.org

R. S. RADFORD
*BRIAN T. HODGES
**Counsel of Record*
Pacific Legal Foundation
10940 NE 33rd Place,
Suite 210
Bellevue, WA 98004
Telephone: (425) 567-0484
Facsimile: (425) 576-9565
rsr@pacificlegal.org
bth@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, Cato Institute, and Atlantic Legal Foundation