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

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF FISH & WILDLIFE AGENCIES SUPPORTING PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

For the past century, North America's state, provincial, and territorial fish and wildlife agencies have upheld the primary responsibility for conserving and preventing the exploitation of North America's wildlife resources on public and private lands within their borders. The Association of Fish & Wildlife Agencies ("AFWA")[1] represents these agency members in Washington, DC to advance sound, science-based management and conservation policy for fish and wildlife and their habitats and also works to strengthen state, federal, and private cooperation in conserving America's natural resources in the public interest.

Founded in 1902 under a different name, AFWA originally formed to establish a system of mutually beneficial interstate cooperation in game and fish management. Its work over the past century has spanned from involvement with the passage of the Migratory Bird Treaty Act in 1918 to creating a model of state fish and wildlife agencies in 1934 to advocacy in 2010 for dedicated funding in climate change legislation for natural resource adaptation. AFWA has also participated as *amicus curiae* in the nation's courts, including before this Court, to safeguard the rights and interests of its members.

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[1] Counsel of record for all parties received notice at least 10 days before the due date of the amicus curiae's intention to file this brief. Letters of consent from all parties accompany this brief. No counsel for a 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.

The bulk of AFWA's agency members maintain Wildlife Management Areas ("WMAs") similar in nature to the WMA managed by the Arkansas Game & Fish Commission ("AGFC") in this case, and many of the WMAs are downstream from and affected by dams with controlled flooding. Indeed, many of AFWA's agency members themselves manage dams with controlled floods that affect downstream acreage owned by others. The Court should grant certiorari to clarify whether temporary physical occupations, including occupations by flooding, can constitute a taking. A ruling from this Court would provide needed clarity to fish and wildlife agencies on current law under the Takings Clause, both as to their rights for their property affected by temporary flooding and as to their obligations for their own flood management. To be clear, AFWA does not support or oppose the position of any particular party to this case. Rather, AFWA merely seeks clarity on behalf of its member agencies on this critical legal issue. Only this Court can provide that clarity, which appears to have been brought into question by the Federal Circuit's opinion in this case.

SUMMARY OF THE ARGUMENT

With good reason, much of the development of takings law in recent decades has pertained to regulatory takings rather than those involving physical appropriation of property. The focus on regulatory takings, however, has seemingly left a gap in the law regarding temporary physical takings. The Federal Circuit's decision in this case has accentuated this uncertainty, particularly for takings caused by intermittent flooding. The Federal Circuit has created a *per se*, categorical rule that a flood cannot effect a taking unless the flood is permanent or inevitably

recurring. This result appears to conflict with this Court's previous rulings on temporary takings and with this Court's and the Federal Circuit's previous analysis of takings involving temporary flooding.

This conflict in the law creates serious difficulty for those, like AFWA's member agencies, who manage land, including wildlife and habitat, downstream from water control structures and for those, including both AFWA's member agencies and the United States Army Corps of Engineers ("Corps of Engineers), who manage those dams and water control structures. This issue deeply affects the management of hundreds of dams and millions of acres of land throughout the United States. Only this Court can provide the legal clarity that the affected parties need to manage effectively the dams, land, wildlife, and habitat in their charge.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION HAS CREATED UNCERTAINTY IN THE LAW REGARDING TEMPORARY TAKINGS, PARTICULARLY THOSE INVOLVING INTERMITTENT FLOODING.

AFWA does not wish to burden the Court by restating arguments set forth in other briefs supporting the petition for a writ of certiorari in this case. AFWA will succinctly note, nevertheless, that the Federal Circuit's decision below creates apparent conflict in applicable case law, thereby creating lack of clarity for AFWA, its agency members, and others.

This Court has previously determined that temporary takings, whether through regulation or

physical occupation of premises, that deny an owner use of its property "are not different in kind from permanent takings, for which the Constitution clearly requires just compensation." *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 318 (1987). In *First English Evangelical Lutheran Church*, the Court recounted and found substantial guidance from three cases decided during World War II, all of which involved appropriation of private property by the United States through physical occupation of premises. *Id.* (relying on *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945)). "Though the takings [in those cases] were in fact 'temporary,' there was no question that compensation would be required for the Government's interference with the use of the property[.]" *Id.* (citation omitted). *First English Evangelical Lutheran Church* itself dealt not with physical occupation of property by the government but rather restriction of use through a county ordinance. *See generally id.* Ultimately, the Court ruled that "the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during" the period of the taking regardless whether the ordinance or regulation at issue is later amended or invalidated. *Id.* at 319.

This Court later more explicitly affirmed the possibility of temporary regulatory takings in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*. 535 U.S. 302 (2002). In that case, the Court held that whether the Takings Clause requires compensation when the government enacts a temporary regulation should be decided not by any

categorical rule but rather by applying the factors of *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Id.* at 342; *see also generally id.* The Court specifically declined to "hold that the temporary nature of a land-use restriction precludes finding that it effects a taking" and rather concluded that the temporary nature of the restriction "should not be given exclusive significance one way or the other." *Id.* at 337. The Court further emphasized that the "'temptation to adopt what amount to *per se* rules in either direction must be resisted.'" *Id.* (quoting *Palazzolo v Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

Yet, it appears that the Federal Circuit in this case has adopted a *per se*, categorical rule in the context of intermittent flooding: "flooding must be a permanent or inevitably recurring condition, rather than an inherently temporary situation, to constitute the taking of a flowage easement. Because the deviations from the 1953 plan were only temporary, they cannot constitute a taking." App. 26a-27a. On its face, this ruling creates an inherent conflict with this Court's holdings on temporary takings as discussed briefly above.

Admittedly, the temporary regulatory takings at issue in *First English Evangelical Lutheran Church* and *Tahoe-Sierra Preservation Council* differ in character than the physical invasion of property that a flood represents. The Court has naturally treated regulatory takings differently than it has treated physical appropriations, and the law governing each fact pattern often has little effect on the other. *See, e.g.*, *Tahoe-Sierra Preservation Council*, 535 U.S. at 323-24. Perhaps this Court has addressed temporary

regulatory takings more in recent years than temporary physical appropriations simply because "physical appropriations are relatively rare [and] easily identified." *Id.* at 324. Regardless, it would seem curious that the Takings Clause would require that just compensation be paid to landowners whose property has been affected by a temporary regulation and not to landowners whose property has been physically appropriated when the Court has also ruled that physical appropriations "usually represent a greater affront to individual property rights" than do regulatory restrictions. *Id.*; *cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (noting that physical appropriations of property are "unusually serious" compared to regulatory restrictions).

While cases involving flooding, or "flowage easements," would seem to fall under the physical-appropriation umbrella of takings law, the Federal Circuit appears to have created a separate rule for the evaluation of flooding cases. Even in that instance, however, the Federal Circuit ruling does not appear to square with dicta in this Court's opinion in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). There, the Court cited flooding cases to demonstrate that a permanent physical occupation would always constitute a taking. *Id.* at 482. In a footnote, it also noted that temporary limitations in intermittent flooding cases "are subject to a more complex balancing process to determine whether they are a taking." *Id.* at 436 n.12.

Further, the Federal Circuit's ruling in this case appears inconsistent with its previous ruling in *Cooper v. United States*, 827 F.2d 762 (Fed. Cir. 1987). There,

as the United States Court of Federal Claims found here, flooding caused by the Corps of Engineers over a period of years killed timber on the plaintiff's land. The court in *Cooper* determined that a taking had occurred even though the Corps of Engineers stopped the flooding after a period of five years. 827 F.2d at 763-64. Though the court did not use this particular language, the flooding in *Cooper* was not permanent or inevitably recurring. *See generally id.*

Although the constitutional underpinnings for such a distinction seem unclear, perhaps flooding or flowage easement takings should occupy their own category in takings law. Again, AFWA takes no position with regard to the merits of the AGFC's claim or the Federal Circuit's decision. That decision, however, seems only to have muddied the law, both as to the rights of the landowners whose property has been flooded and as to the obligations of those managing dam systems in the United States. On behalf of its agency members, AFWA seeks clarity on these points, which only this Court can provide.

II. A GRANT OF CERTIORARI AND RULING BY THIS COURT WOULD PROVIDE CLARITY IN THE LAW THAT HAS SUBSTANTIAL, FAR-REACHING IMPACT.

The temporary, physical occupation of private property by the government represents a fact pattern that could of course present itself in countless hypothetical situations. The clarity provided by a Supreme Court ruling on temporary physical takings would be of critical importance to the resolution of these cases in the future, particularly given the lack of recent discussion on that front. Regardless of the

particular circumstances of those hypothetical situations, a Court ruling in this case on the issue of whether a flood that is not permanent or inevitably recurring can effect a taking would have immediate impact on the management of millions of acres of land in the United States and on the wildlife inhabiting that land. More specifically, such a decision would strongly affect how territorial fish and wildlife agencies manage and protect the public land in their charge and would shape how they, the Corps of Engineers, and others, manage the dam systems that largely determine the flooding of those lands.

To demonstrate the potential impact of this decision and exhibit the amount of land and water control structures at issue, several territorial fish and wildlife agencies have identified property under their jurisdiction that would be affected by the Court's decision in this case. For example, in Louisiana, the Department of Wildlife & Fisheries has identified the following WMAs that could be impacted by a dam or water control structure: Alexander State Forest (283 acres), Atchafalaya Delta (137,695 acres), Attakapas (25,730 acres), Bayou Macon (6,919 acres), Bayou Pierre (2,212 acres), Big Colewa Bayou (899 acres), Big Lake (19,231 acres), Boeuf (50,967 acres), Dewey Wills (63,401 acres), Elbow Slough (160 acres), Elm Hall (2,839 acres), Grassy Lake (12,983 acres), Joyce (26,152 acres), Little River (3,911 acres) Manchac (8,328 acres), Maurepas (103,000 acres), Ouachita (10,989 acres), Pass-a-Loutre (115,596 acres), Pearl River (35,031 acres), Pomme de Terre (6,434 acres), Red River (29,964 acres), Russell Sage (16,559 acres), Sabine Island (8,695 acres), Salvador (33,047 acres), Sherburne (11,780 acres), Spring Bayou (12,506 acres), and Three Rivers (26,204 acres). The bulk of this

acreage (479,591 acres) is bottomland hardwood forest and cypress swamp.

In South Carolina, the Department of Natural Resources has identified three impoundments managed by the Corps of Engineers that are upstream from four separate WMAs. The impoundments include Hartwell Dam and Lake, Richard B. Russell Lake & Dam, and J. Strom Thurmond Lake & Dam. The WMAs, all located along the Savannah River, include the Mason Tract WMA, with 1.2 miles of river frontage, the Hamilton Ridge WMA, with an estimated floodplain of between 5,000 and 6,000 acres, the James W. Webb WMA, with an estimated floodplain of 3,000 acres, and the Palachucola WMA, with an estimated floodplain of 2,000 acres.

On the other side of the coin, The Pennsylvania Game Commission owns over 300 dams, 50 of which are permitted and 7 of which are considered high hazard. In Rhode Island, there is one federally-owned dam, and the State has determined that that dam presents a significant risk of flooding downstream. The State of Rhode Island owns 77 dams, 17 of which present a significant risk of flooding downstream. In Tennessee, the Wildlife Resources Agency has identified 18 lakes in western and middle Tennessee, all of which have some sort of dam, and nearly of which are managed by the Agency. In Arizona, the Game and Fish Department manages 37 dams, seven of which fall into a high hazard classification and three of which fall into a significant hazard classification.

Arkansas provides an example of at least one state that manages both dams with water control structures and also manages land and wildlife downstream from

these dams and those operated by others, primarily the Corps of Engineers. Specifically, the AGFC identified 46 dams with water control structures that it operates. Further, the AGFC identified the following WMAs that could be impacted by a dam or water control structure: Henry Gray Hurricane Lake (17,524 acres), Mike Freeze Wattensaw (19,184 acres), Bayou Meto (33,832 acres), Sulphur River (16,520 acres), Little River (597 acres), Beryl Anthony Lower Ouachita (7,020 acres), Trusten Holder (8,173 acres), Petit Jean (15,502 acres), Harris Brake (2,700 acres), and Galla Creek (3,329 acres).

These represent but a few examples of the millions of acres of land, including the wildlife and habitat of those lands, across the United States that are impacted by decisions regarding flood management. Again, those flood-management decisions would largely be shaped by the Supreme Court's decision should it grant certiorari and rule on this case. The incredible amount of land at issue is amplified when considering that the WMA affected in this case, the Dave Donaldson Black River WMA, is located 115 miles downstream from the Clearwater Dam. It would entail speculation, but the amount of land and number of landowners, public or private, affected by this single dam is staggering to contemplate. The numbers grow monumentally from there when considering the number of dams affected across the country as a whole. At the least, this particular fact pattern and the law governing it profoundly impact the territorial fish and wildlife agencies throughout the United States, both as to their management of public land, including the wildlife and habitat on the land, and in their management of dam systems affecting downstream lands. The Court should grant certiorari to provide the

clarity that these entities need to carry out effectively the important task that is their charge.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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