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

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

In opposing certiorari, the United States works hard to muddy the cleanly presented and dispositive legal question presented in the Arkansas Game & Fish Commission's ("Commission's") Petition, while taking creative license with the story of what it did to the Commission. Despite its efforts, this case squarely presents the issue of whether the government may foreseeably cause massive, permanent damage in the face of repeated objections without paying just compensation simply because its actions are not permanent. If the answer is "no," then the Federal Circuit's decision cannot stand and this case should be remanded for the Federal Circuit to apply the established balancing test. Pet. 11. That test, as Judge Newman described it, looks at all the circumstances to decide "whether the increased flooding caused significant injury before the flooding was abated, such that, on balance, the Fifth Amendment requires just compensation." Pet. 9 (quoting App. 36a (Newman, J., dissenting)).

I. There Are No Material Disputes of Fact Burdening the Question Presented.

The United States agrees that the Federal Circuit's permanency rule is an outcome-determinative legal requirement. *E.g.*, Opp. 12-13 (arguing that the Federal Circuit properly refused to consider anything else because "mere episodes of temporary flooding are not a taking"). Whether described as a "requirement" (Opp. 13), a "threshold" (Opp. 14), or a *per se* rule, permanency was the only factor considered. That one-factor analysis allowed the panel majority to hold that the government does not owe just compensation for destroying and damaging timber through six years of government-induced flooding because its actions were

not permanent. *E.g.*, App. 22a, 27a. To discourage this Court's review of that rule, the United States labors to make the Commission's legal challenge seem unattractive by presenting imagined factual disputes. The United States even reinvents the question presented as a merits question. None of those disputes burden the question presented.

The United States sets up a straw-man fact argument that the Commission has only challenged the deviations as being "labeled" temporary. Opp. 12. This is a false distraction. The Commission has always conceded, even at oral argument before the panel, that the actions themselves were substantively temporary. *E.g.*, App. 23a-24a, 48a-52a, 82a. While the Commission does not agree with the United States' sterilized characterization of its actions,[1] the dispute is immaterial here. The Commission has never argued that the Corps's actions were permanent.

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[1] For example, the United States repeatedly describes the Corps's water release deviations between 1993 and 2000 as "ad hoc and independent decisions" (Opp. 7) that were "not uniform" (Opp. 3), were "varied in timing and reasons" (Opp. 10), and amounted only to "mere episodes of temporary flooding" (Opp. 13). *See also* Opp. 11 & n.3. In truth, the Court of Federal Claims found that the Corps implemented a protested "series of deviations" throughout the 1993-2000 period (App. 48a, 50a), many of which it admits were granted for "farmers who plant low-lying acreage downstream of Clearwater Dam" (App. 48a), creating a unique "pattern" of increased flooding on the Commission's management area, especially during the growing seasons when the trees cannot tolerate it (App. 50a, 52a, 85a, 107a). Judge Lettow rejected the idea that the deviation actions were "isolated invasions that might merely constitute a tort." App. 89a, 107a-108a, 114a.

The United States also says that an "unresolved" evidentiary dispute "makes this case a particularly unattractive vehicle." Opp. 8. The dispute it cites is not a question of whether certain evidence should have been admitted, but only whether Judge Lettow correctly weighed competing expert testimony at trial. *E.g.*, Opp. 20. That dispute is immaterial for at least two reasons. One, the panel majority did not consider the questions of causation and whether the flood invasions were "'sufficiently substantial.'" App. 16a, 22a. The panel majority looked only at whether the government's actions were temporary or permanent. App. 23a. Two, the United States does not at all describe the situation correctly. The United States' SUPER model was "far from unassailable." *E.g.*, App. 112a. Even the Corps admitted that the "flooding is more extensive than our modeling predicted and the duration is probably more." App. 99a, 186a. As Judge Lettow found, the increased flooding on the Commission's property was significant, not marginal, and the resulting timber damage was not indirect and consequential, but foreseeable as the direct, natural, and probable result of the Corps's actions. *Compare, e.g.*, Opp. (I), 15, 16, 19, 21 *with, e.g.*, App. 31a-32a, 92a, 99a, 102a, 114a. He did not rely solely on the Commission's experts like the United States suggests (Opp. 19). Judge Lettow cited the United States' *own* expert testimony that "'[t]he Corps's deviations resulted in substantial additional flooding on the [Management Area] . . . .'" App. 111a; *see also* App. 185a. He found that testimony to be "[p]erhaps the most dramatic evidence in this regard . . . ." App. 111a.

The Commission asks this Court to reverse the Federal Circuit's decision because it considered

nothing but the permanency of the government's actions. The court of appeals can then resolve the United States' disputes about the findings of fact that Judge Lettow rendered in his lengthy opinion after hearing from eighteen witnesses at a two-week trial, a site visit, pre- and post-trial briefing, and post-trial argument. Although the United States says that asking this Court to remand makes this case "unattractive," the Court frequently reviews cases to resolve a key constitutional dispute before remanding to address the merits. *E.g.*, *Phillip Morris USA v. Williams*, 549 U.S. 346, 357-58 (2007); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992). This case presents an unburdened legal question of whether the Federal Circuit's permanency rule preserves the protections guaranteed in the Takings Clause.

II. The Court Should Clarify the Scope of Takings Clause Protections for Non-Permanent Invasions.

The United States exposes just how unprecedented the Federal Circuit's permanency rule truly is. It argues that cases like *Sanguinetti v. United States*, 264 U.S. 146 (1924), actually *require* the Federal Circuit to wholly ignore the massive and foreseeable damage that the United States inflicted in the face of repeated objections and warnings. *See* Opp. 10 ("That result is dictated by *Sanguinetti* itself."). The United States stretches *Sanguinetti* far beyond its bounds. That it and the Federal Circuit could infer such a rule confirms that this Court's review is needed to clarify that permanency cannot be the sole factor.

The United States' argument that the Court in *Sanguinetti* saw no taking because the flooding "was

too temporary in nature" (Opp. 11) rests entirely on isolated dicta. The temporal aspect of floods there was simply not the only relevant factor. *Sanguinetti* also considered that the amount of permanent damage was not shown; the landowner had not lost the "customary use of the land" except for short periods of time; and the flooding was neither "the direct or necessary result of the structure" nor "within the contemplation of or reasonably to be anticipated by the government." *See Sanguinetti*, 264 U.S. at 149-50 (1924). Here, even the United States admits that the Federal Circuit refused to consider anything but the duration of the government's actions because it deemed anything else *irrelevant* to its analysis. Opp. 16(ii); *see also* App. 22a.

The United States' mislaid focus on *Sanguinetti* ignores the conflicting Federal Circuit precedent that is the most factually and legally analogous to the takings claim made by the Commission. *See Cooper v. United States*, 827 F.2d 762 (Fed. Cir. 1987) (awarding compensation for timber destroyed by temporary, government induced flooding). The out-of-context dicta the United States cites from *Sanguinetti* conflicts with the Federal Circuit's own decision in *Cooper* and with the bedrock Takings Clause rules this Court has applied in numerous cases like:

- *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 178 (1871) (reasoning that to so narrowly construe the Takings Clause as to let the government permanently damage property through floods without any compensation "would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of

the government, and make it an authority for invasion of private right under the pretext of the public good");

- *Causby v. United States*, 328 U.S. 256, 261 (1946) ("It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken.");

- *United States v. Dickinson*, 331 U.S. 745, 748 (1947) ("The Fifth Amendment expresses a principle of fairness . . . .");

- *Kimball Laundry Co. v. United States*, 338 U.S. 1, 14 (1949) (pointing out that a temporary, "year to year" invasion deprives the plaintiff of certainty as to when it can go back to operating its business without interference, so that "[t]here was nothing it could do, therefore, but wait");

- *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's [Takings Clause] . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.");

- *Penn-Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1976) (eschewing any "set formula" for determining when "justice and fairness" require compensation by the government under the Takings Clause and holding that when engaging in "essentially ad hoc, factual inquiries," significant factors to consider include (1) the character of the

governmental action, (2) the economic impact of government regulation on the claimant and, particularly, (3) the extent to which the regulation has interfered with distinct investment-backed expectations);

- *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) ("Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant.") (internal citations omitted); and

- *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 337 (2002) (recognizing that the "temporary nature" of a property restriction "should not be given exclusive significance one way or the other").

Until now, no case has ever held that regardless of the damage or other circumstances, the government can avoid all liability for its temporary actions. Similarly, no court has ever found that legislative enactments like the National Environmental Policy Act ("NEPA") can shield the government from liability for violating constitutionally-protected rights. The government offers that procedural laws like NEPA will "tend" to discourage it from abusing the constitutional authority created here. *See* Opp. 18. But those laws do not constrain the ultimate, substantive decision, they do not compensate for injuries from government

invasions, and they did not prevent the destruction of the Commission's property here.[2]

As Judge Newman put it, the Federal Circuit's permanency rule "contradicts the entire body of precedent relating to the application of the Fifth Amendment to government-induced flooding." *See* App. at 37a (Newman, J., dissenting). That rule was outcome-determinative here and now applies to every flood control project that the federal government operates throughout the United States; if a landowner seeks more than $10,000 in just compensation, it must go through the Court of Federal Claims and the Federal Circuit. *See* Pet. 12 & n.1 (citing 28 U.S.C. §§ 1295(a)(3), 1346(a)(2), 1491(a)(1), (c)). That the Federal Circuit would conceive such an unfair rule that so upsets ordinary expectations, departs from precedent, and expands the government's authority to invade without paying just compensation shows how much this Court needs to clarify that temporary flood invasions can take property.

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[2] Ironically, the Corps had been testing its proposed revised water control plan for some time throughout the late 1990s up until 2001 while it actively engaged in the NEPA decision-making process. It was only after the Commission, joined by the U.S Fish and Wildlife Service and others, adamantly complained about the recurring deviations and the findings contained in the Draft Environmental Assessment and Finding of No Significant Impact that the Corps finally acknowledged its deviations were "negatively impacting [the Management Area] during [the] growing season" and ceased efforts to make the deviations permanent. App. 49a-52a, 55a-56a.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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