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 *AMICI CURIAE* STATES OF ARKANSAS, LOUISIANA, MISSISSIPPI, AND SOUTH DAKOTA SUPPORTING PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The facts of this case are straightforward. The Arkansas Game & Fish Commission ("Commission") owns approximately 23,000 acres of land along the Black River in northeastern Arkansas that it manages as the Dave Donaldson Black River Wildlife Management Area ("Management Area"). The forests in the Management Area are comprised of different hardwood timber species, with the dominant species being nuttall, overcup, and willow oaks.

In 1948 in southeastern Missouri, upstream from the Management Area, the Army Corps of Engineers ("Corps") constructed the Clearwater Lake and Dam after the passage of the Flood Control Act of 1938, Pub. L. No. 75-761, 52 Stat. 1215, 1218. After construction of the dam was complete, the Corps immediately began to control releases of water from Clearwater Lake via the dam, and the timing and sizing of these water releases were published by the Corps in 1953 in the Clearwater Lake Water Control Manual ("Water Control Plan"). During the next forty (40) years the Corps followed its Water Control Plan, and the Commission's Management Area flourished. But from 1993 to 2000 the Corps implemented a series of consecutive, annually-approved deviations from its established Water Control Plan. The Court of

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[1] In accordance with Rule 37.2 the State of Arkansas provided notice to all counsel of record for all parties on November 29, 2011, which is more than 10 days before filing.

Federal Claims found that the effects of these deviations resulted in the destruction of more than five million dollars ($5,000,000) of timber in the Management Area, and that the Corp's actions constituted a taking in violation of the Fifth Amendment. *Arkansas Game & Fish Comm'n v. United States*, 87 Fed. Cl. 594, 623 (2009). A split panel of the Federal Court of Appeals reversed. According to the majority panel, no taking had occurred because the Corps, after finally confirming the destruction complained of by the Commission for almost a decade, ceased its deviations from its Water Control Plan. Relying on flooding cases that analyzed and discussed flowage easements, the majority panel ruled that government-induced flooding that is not permanent falls within the category of torts and cannot, as a matter of law, be a taking. *See* App. 21a-22a.

Amicus State of Arkansas wants the Court to be cognizant of the fact that, pursuant to Amendment 35 of the Arkansas Constitution, the Commission is an independent constitutional agency. The Commission receives no revenue from the Arkansas General Assembly general revenue fund, and litigated this matter without input, or support, from the Arkansas Attorney General's office or any other Arkansas state agency. Amicus curiae the State of Arkansas files this brief, along with the other named amici curiae states, because they believe that the Federal Court's decision in this case has created a new exception in takings jurisprudence that warrants this Court's review.

William Blackstone famously proclaimed, "nothing strikes ... the imagination, and affects and engages the affections of mankind, as the right of property." William Blackstone, *Commentaries on the Laws of England 2* (Univ. of Chi. Press 1979 (1766)). Besides the Fifth Amendment mandate that prohibits the federal government from taking private property without just compensation, basic fairness demands that the government compensate owners whose property it takes. This Court pronounced this fairness-based justification for the Fifth Amendment's compensation requirement in *Armstrong v. United States*, 364 U.S. 40 (1960), when it wrote:

> The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation 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. *Id.* at 49.

This fairness aspect is particularly acute in this case because the Corps is immune from tort liability for federal flood control projects under the Flood Control Act of 1928, 33 U.S.C. §702c. The Court of Appeals decision, if not reviewed and overturned by this Court, will leave the Commission and other future parties without redress when the government engages in future temporary flooding regimes that result in damage to property. For this reason, amici states urge this Court to grant certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Fifth Amendment to the Constitution of the United States provides, in part: " * * * nor shall private property be taken for public use, without just compensation." Over the years this Court has parsed takings into two general categories. The first is when government action results in a physical appropriation or destruction of property. In these cases, this Court has generally held that a taking has occurred. The second category recognizes that while the government may find it otherwise necessary to regulate the use of property from time to time, and while such regulatory activity does not typically result in a taking, in some instances the regulatory interference with the use of the property is so pervasive that it amounts to a taking. While the concept of what constitutes a "regulatory taking" continues to evolve, amici states argue that a situation in which the government's conduct results in a direct physical appropriation or destruction of property meets the standard and has, for decades, been recognized as a taking. In short, physical appropriation or destruction of property due to continuing government conduct over a period of years is a taking. Indeed, for the first 130 years of the Republic, there was not much doubt that the Constitution's takings clause applied to direct takings of property. *Mulger v. Kansas*, 123 U.S. 623 (1887). Nevertheless, a majority panel in *Arkansas Game & Fish Comm'n v. United States*, 637 F.3d 1366 (Fed. Cir. 2011) has misapplied this Court's takings cases

and has carved out an exception to the longstanding principle that destruction of property caused by deliberate government action constitutes a taking. According to the majority panel, the Corps' induced flooding in the Commission's Dave Donaldson Black River Management Area that lasted from 1993 to 2000, and resulted in the destruction of nearly 18 million board feet of timber across portions of the roughly 23,000 acre Management Area, does not constitute a taking because the Corps eventually ceased its destructive flooding eight (8) years after it began. Under the logic espoused by the Federal Appeals Court, destruction of private property due to prolonged, deliberate, authorized government action is not a taking when the government policies that resulted in the destructive flooding are "temporary," rather than "permanent." Creating a per se rule exempting "temporary" government flooding from a Fifth Amendment Taking conflicts with a number of decisions by this Court and other federal court cases, starting with *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871). For this reason, the State of Arkansas urges this Court to grant certiorari.

2. In addition to misapplying this Court's takings decisions to the undisputed facts in this case, the majority panel of the Federal Court of Appeals also failed to follow two of its own cases on point. Contrary to the majority panel's decision in *Arkansas Game & Fish Comm'n v. United States*, 637 F.3d 1366 (Fed. Cir. 2011), other cases have held that "temporary" government action that causes flooding resulting in

the destruction of property can constitute a taking. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003); *Cooper v. United States*, 827 F.2d 762 (Fed. Cir. 1987). The Federal Circuit's failure to follow this precedent warrants this Court's review.

3. According to the majority panel's decision, the Corps' actions in this case "at most created a tort liability." *Arkansas Game & Fish Comm'n v. United States*, 637 F.3d 1366, 1378-79 (Fed. Cir. 2011). In the future, other parties faced with similar "non-permanent" appropriations or destruction of private property due to flood waters will be left without an avenue to seek redress for the government's actions. The Flood Control Act of 1928, 33 U.S.C. §702c provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." Congress' grant of immunity bars the very remedy the Federal Circuit has held is applicable under these facts. Amici states believe that this result, and the future negative impact it may have on areas throughout the nation that abut federal control projects along navigable waterways, warrants this Court's grant of certiorari.

ARGUMENT

I. The Federal Circuit's Decision Conflicts With Takings Decisions From This Court And Other Federal Courts That Recognize Temporary Takings

The original understanding of the Constitution's takings clause was that it applied only to physical appropriations of property. However, in the case *Pumpelly v. Green Bay*, 80 U.S. 166 (1871), this Court made a substantial inroad into that notion. The *Pumpelly* case was brought by a landowner against his downstream neighbor who had built his dam under a license granted by the state, and the defendant asserted that he therefore had a "right, under legislative authority, to build and continue the dam without legal responsibility for those injuries." *Id.* at 176. The question thus became whether the "State had a right to inflict [the damages sustained by the plaintiff] without making any compensation for them." *Id.* The takings clause was asserted as the basis for concluding the state did not have such a right. *Id.*

The thrust of the defendant's argument was that "there is no taking of the land within the meaning of the constitutional provision, and that the damage was a mere consequential result of legitimate governmental action, fostering the improvement of a navigable stream." *Id.* at 177. The defendant claimed that the case was not a true "taking" in the Constitutional sense, because the defendant's lands had not been taken or appropriated, but merely affected. In other

words, the plaintiff still had his land; it was just under water.

This Court disagreed with the defendant's position concerning the inapplicability of the takings clause to the damage at issue. This Court held that:

> [W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution. . . ." *Id.* at 181.

Relying on the reasoning announced in *Pumpelly*, this Court and other courts continued to develop Fifth Amendment Takings Law as it applied to instances of government flooding. *See, e.g.*, *United States v. Cress*, 243, U.S. 316, 328 (1917) (A taking occurred where the erection of a lock and dam subjected the plaintiff's land to frequent overflows of water); *United States v. Dickinson*, 331 U.S. 745, 751 (1947) (Finding a taking although the plaintiff reclaimed most of the land that the government flooded).

In this case, the Federal Circuit erred because it limited takings claims to instances when the government's flood intrusions into property are permanent, rather than temporary. But this Court's precedents do not require permanent government action as a condition precedent in order for a taking to occur. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), this Court cited a series of

flooding cases to underscore its conclusion that, while the analysis of whether a specific physical government intrusion constitutes a taking requires the application of a complex balancing test, the fact that the intrusion is temporary does not, by itself, exempt the intrusion from that analysis and a taking claim. *See also United States v. Dickinson*, 331 U.S. 745, 751 (1947); *cf. San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657-58 (1981) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable."); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987) (holding that the government must pay just compensation even if it rescinds a regulatory taking); *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) ("All takings are 'temporary' in the sense that the government can always change its mind at another time.").

Pursuant to the logic espoused by the Federal Circuit in this case, the Corps could have engaged in twenty-five (25), fifty (50) or even one-hundred (100) year-to-year deviations from its Water Management Plan without being held liable for a taking, so long as those deviations were not a "permanent" policy decision. To claim that government flooding is not compensable under the Fifth Amendment based solely on whether the government's policy decisions to initiate the flooding are temporary or permanent is woefully inadequate for fulfilling the purpose behind the Takings Clause. That clause requires just compensation 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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The Federal Circuit grudgingly acknowledged that this Court's decisions indeed hold that temporary government action "[i]n general" can lead to a taking. *See* App. 18a. But it erred when it distinguished the law of temporary takings from flooding cases. Contrary to the Federal Circuit's decision, instances of repeated, methodical, and planned government flooding that eventually cease do not occupy a special niche in takings jurisprudence. Admittedly, some government actions that have resulted in short duration floods have been held not to constitute a taking. *See, e.g.*, *Hartwig v. United States*, 485 F.2d 615, 620 (Ct. Cl. 1973) ("The principle may be reduced to the simple expression: "One flooding does not constitute a taking."). Also, when a government induced flooding does not produce extensive or permanent damage, a taking does not occur, even if the flooding is long-standing and continuous. *Sanguinetti v. United States*, 264 U.S. 146, 149-50 (1924). ("If there was any permanent impairment of value, the extent of it does not appear"). But the analysis underpinning the *Hartwig* and *Sanguinetti* decisions does not apply in this case because in this case it was undisputed at trial that the Corps' actions that resulted in the destruction of timber in the Commission's Management Area were not a "one time" event – in this case the Corps flood control policy lasted eight years. Moreover the resulting

damage from the Corps' eight-year flood control policy was not inconsequential. It amounted to more than five million dollars ($5,000,000) worth of timber and more than one hundred seventy-five thousand dollars ($175,000) in incurred repair costs. The Federal Circuit's decision is in error because it conflicts with the Takings Clause and this Court's decisions that temporary government actions can result in Fifth Amendment Takings. Amici states petition the Court to grant review and then reverse and remand this matter to the Federal Circuit.

II. The Federal Circuit Erred By Not Following The *Ridge Line* And *Cooper* Cases

Previous to the Federal Circuit's decision in this case, no court has ever held that timber damage due to flooding is never compensable if the government's decisions that created the flooding and damage are eventually stopped after eight consecutive years. Indeed, two Federal Circuit decisions, *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003) and *Cooper v. United States*, 827 F.2d 762 (Fed. Cir. 1987) hold just the opposite.

The *Ridge Line* case involved the construction of a postal facility. The paved areas of the new facility altered the natural stormwater runoff, causing flooding and damage to the Ridge Line shopping center. Ridge Line eventually implemented its own measures to control and stop stormwater runoff from the postal facility from damaging its property.

Nevertheless, Ridge Line filed suit against the government alleging a temporary taking of its property. The Claims Court denied the relief sought by Ridge Line ruling that the flooding was not permanent, and therefore not compensable as a Fifth Amendment Taking. Ironically, the Federal Circuit reversed and remanded, noting that the Claims Court had erred because it had confined its "analysis of liability to whether the government's actions constituted a permanent and exclusive occupation." 346 F.3d at 1352. The Federal Circuit went on to explain that "intermittent flooding of private land can constitute a taking" and that continuous inundation was not required. *Id.* at 1357.

But if there were any doubt about whether the government was exempt from a temporary takings claim due to deliberate flooding of property over a period of years, it was answered by the Federal Circuit's decision in *Cooper*. On facts virtually identical to those in this case, the Federal Circuit addressed a 1979 construction blockage that imposed seasonal flooding while the Corps of Engineers tried to clear it. 827 F.2d at 763-64. The flood water subjected Cooper's timbered land to standing flood water for prolonged periods during the spring and summer growing seasons. The Corps succeeded in clearing the blockage in 1984, but five years of intermittent flooding had, by then, killed the plaintiff's timber. Even though the flooding was stopped by the Corps five years after it commenced, the Federal Circuit held that the Corps' temporary flooding constituted a

taking, and awarded Cooper the value of the destroyed timber. *Id.* at 763-64.

In this case the Federal Circuit majority attempted to distinguish its own *Cooper* decision by reasoning that *Cooper* "did not discuss the tort versus taking distinction." *See* App. 26a-27a, FN.7. Under the facts of this case, that argument is a distinction without a difference. As in *Cooper*, the Corps in this case flooded property over a period of years. Like *Cooper*, that flooding took place during the critical spring and summer growing seasons. And like *Cooper*, the Corps' temporary flooding regime resulted in the destruction of acres of timber. In short, there is no real distinction between the facts in *Cooper* and the facts in this case. The only distinction between this case and *Cooper* is the result. In *Cooper* the Federal Circuit found that a compensable taking had occurred; in this case the Federal Circuit held that, at most, a tort had occurred. The Federal Circuit's ignoring its own taking decisions handed down in *Ridge Line* and *Cooper* demonstrates how much this Court's review is required.

III. The Federal Circuit's Decision Has Serious Repercussions For Areas That Abut This Nation's Navigable Waters

Every year millions of sportspersons engage in wildlife-associated activities such as fishing, hunting and birding. According to a survey conducted by the U.S. Fish and Wildlife Service, sportspersons spent a

total of $76.7 billion on items used for hunting and fishing in 2006. U.S. Fish and Wildlife Service, *2006 National Survey of Fishing, Hunting, and Wildlife Associated Recreation*. Among the most zealous of these sportspersons are those who pursue ducks and geese along the flyways that abut the nation's navigable streams and rivers. Waterfowl hunters spend money on a variety of goods and services for trip-related and equipment related purchases. Trip-related expenditures include food, lodging, transportation, and other incidental expenses. *Id.* Equipment related expenditures consist of guns, decoys, camping equipment, clothing, and other costs. These expenditures in turn have a ripple effect throughout the economy, having positive impacts on local retailers, wholesalers, manufacturers, employment, and household income. According to the U.S. Fish and Wildlife, waterfowl hunting in 2006 along the nation's flyways generated $2.3 billion in total output in the United States; created 27,618 jobs with $884 million in employment income; and $154 million in state tax revenue and $193 million in federal tax revenue. *Id.* Among the states, Arkansas, Louisiana, Mississippi, Missouri, Texas, and South Dakota are some of the largest beneficiaries of these ripple effects, and amici states are confident that these positive economic impacts have continued to rise since 2006. *Id.* The continued health of habitat, both public and private, that abuts federal flood control projects is a vital concern to the states.

But the economic benefits associated with these riparian lands are not limited to just hunting. Amici states, and the majority of other states in the nation, hold in trust public lands and state parks along navigable rivers that can be influenced by federal flood control projects. Similar to waterfowl hunters that spend time and money in the nation's flyways, the annual visitors to state parks also create a ripple effect throughout the economy, having positive impacts on local retailers, wholesalers, manufacturers, employment, and household income. Amici states are aware that the likelihood that the Corps would deliberately flood and damage a state park is remote. But the Federal Circuit's decision in this case is so broad that the Corps *can* "temporarily" flood all riparian property within the reach of any flood control project every year, fundamentally altering and damaging these ecosystems, without fear of liability. Consequently, amici states are alarmed about the continued viability of these areas, and the widespread economic tumult that would result if they are damaged.

The anxiety the amici states have is particularly acute as it relates to the Nation's Wildlife Management Areas that abut federal flood control projects. Wildlife Management Areas are an integral part of this nation's outdoor recreation system and have been established to protect those lands that have a high potential for wildlife production, and the attendant public hunting, trapping, fishing and other compatible recreational uses at little or no cost to the

participants. Taxpayers throughout the nation have funded the efforts to preserve and protect these critical properties. Wildlife Management Areas are the backbone of each state's wildlife management efforts, and areas that abut the country's navigable waters are among the most critical. These Wildlife Management areas provide hundreds of thousands of citizens in each amicus state, and millions of citizens across the country, access to prime, public resources so that they may hunt major game species such as waterfowl, deer, turkey, rabbit, and squirrel. Even citizens who are not hunters can enjoy the splendor of hiking and wildlife watching that abounds in these natural areas. These lands are the cornerstone of each state's wildlife management, and the majority of a wildlife manager's work is dedicated toward protecting and enhancing wildlife habitat in Wildlife Management Areas. Forest openings are maintained to benefit waterfowl, turkey, and deer. Wildlife food plots are managed to feed both resident and migratory species. Shelter belts are planted to provide winter cover and nesting sites for birds and other nongame species. Yet, despite the success each state has had in enhancing its Wildlife Management Areas, the nation is still losing wildlife habitat at an alarming rate. Amici states believe that the trend of loss of wildlife habitat may accelerate if the Federal Circuit's decision in this case is not reviewed and overturned by this Court.

The Federal Circuit decision has effectively carved out a category of physical invasions from the

Takings Clause. The Federal Circuit has declared, as a matter of law, that the Takings Clause does not provide compensation when temporary government actions cause destructive flooding. The Fifth Amendment is grounded in basic fairness, and fairness is the reason for requiring that the government compensate owners whose property it takes. *Armstrong v. United States*, 364 U.S. 40 (1960).

The Federal Circuit's Takings Clause exemption for temporary flood waters, coupled with the immunity provided by Congress to the government under the Flood Control Act of 1928, 33 U.S.C. §702c, leaves amici states and the rest of the states in an untenable situation regarding the management of their riparian property that abuts federal flood control projects along the nation's navigable rivers. The Federal Circuit's prophylactic Takings Clause exception for temporary flood waters means that the government may temporarily and repeatedly manipulate flooding regimes creating substantial, foreseeable damage to state property near federal flood control projects without incurring any liability. In turn, this affects how each state will addresses state park and wildlife management of these areas in the future. In this instance, there is no dispute that thousands of acres of timber have been destroyed by the Corps in the Dave Donaldson Wildlife Management Area, and that this property is in need of restoration. Restorations requires resources, resources are scarce, and there is no incentive to spend valuable taxpayer dollars managing and restoring these critical areas if the

Corps can engage in ad hoc, year-to-year policy decisions that can destroy them again in the future. (Although the Corps has now refrained from the Water Plan diversions which caused destructive flooding in Arkansas' Dave Donaldson Wildlife Management Area, nothing prevents the Corps from resuming those destructive diversions at its sole discretion.) The Federal Circuit's decision exempting temporary flood waters from takings claims falls woefully short of the fairness required by the Constitution's Takings Clause. Amici states of Arkansas, Louisiana, Mississippi and South Dakota urge this Court to grant certiorari.

CONCLUSION

Based upon the above stated arguments, the amici states respectfully request that the Court grant the Petition for Writ of Certiorari.

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