No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Arkansas Game & Fish Commission, a constitutional entity of the State of Arkansas, sought just compensation from the United States under the Takings Clause of the Fifth Amendment for physically taking its bottomland hardwood timber through six consecutive years of protested flooding during the sensitive growing season. The Court of Federal Claims awarded $5.7 million, finding that the Army Corps of Engineers' actions foreseeably destroyed and degraded more than 18 million board feet of timber, left habitat unable to regenerate, and preempted Petitioner's use and enjoyment. The Federal Circuit, with its unique jurisdiction over takings claims, reversed the trial judgment on a single point of law. Contrary to this Court's precedent, a sharply divided 2-1 panel ruled that the United States did not inflict a taking because its actions were not permanent and the flooding eventually stopped. The Federal Circuit denied rehearing *en banc* in a fractured 7-4 vote. The question presented is:

> Whether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the Takings Clause.

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This case presents a compelling opportunity for this Court to clarify takings law by holding that any physical invasion that falls short of a *per se* taking must be weighed upon all the circumstances. Certainly, not every government invasion of property constitutes a taking. But the core Fifth Amendment standards do not suffer the government a free license to temporarily invade private property. The Federal Circuit in this case recognized that rule but concluded that flood waters are different, even when the government increases flooding on one person to benefit others and foreseeably inflicts massive damage. Because a fractured Federal Circuit in this case reversed the Court of Federal Claims' award of just compensation for timber and habitat on the sole ground that the United States' six-year flooding regime was "inherently temporary," the Arkansas Game & Fish Commission respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. If the Court grants review and reverses, the Commission asks the Court to remand with directions to consider all the facts and circumstances.

OPINIONS BELOW

The precedential opinion of the Court of Federal Claims is reported at 87 Fed. Cl. 594 and reproduced at App. 38a. The precedential opinion of the Federal Circuit is reported at 637 F.3d 1366 and reproduced at App. 1a. The Federal Circuit's precedential order denying panel rehearing and rehearing *en banc* is electronically reported at 2011 WL 3511076 and reproduced at App. 162a.

JURISDICTION

The Federal Circuit rendered its decision on March 30, 2011. The Arkansas Game & Fish Commission petitioned for rehearing *en banc* on May 13, 2011. The Federal Circuit subsequently denied panel rehearing and rehearing *en banc* on August 11, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

The relevant provisions of the Tucker Act, as codified at 28 U.S.C. § 1491(a)(1), (c), are reproduced at App. 181a. Statutory sections 28 U.S.C. §§ 1295(a)(3) and 1346(a)(2), which further establish the jurisdiction of the Court of Federal Claims and the Federal Circuit, are reproduced at App. 180a. A relevant portion of the Flood Control Act of 1928, as codified at 33 U.S.C. § 702c, is also reproduced at App. 182a.

STATEMENT OF THE CASE

This case raises the question of whether the United States can be held liable under the Fifth Amendment's Takings Clause for physically taking property through temporary flood invasions. From 1993 to 2000, over the Arkansas Game & Fish Commission's ("Commission") warnings and objections, the United

States Army Corps of Engineers ("Corps of Engineers" or "Corps") imposed a temporary flood regime to benefit specific upstream interests by deviating from the approved 1953 Water Control Plan at Clearwater Dam sitting upstream from the Commission's Dave Donaldson Black River Wildlife Management Area ("Management Area"). For the first six years (the last two years being drought years), the Corps of Engineers' actions flooded the Commission's bottomland hardwood forest at a time and to an extent that it could not tolerate, killing and degrading thousands of trees—nearly 18 million board feet—across portions of the roughly 23,000 acre Management Area. In 2001, the Corps of Engineers stopped deviating and abandoned plans to permanently change the Water Control Plan after a test release from Clearwater Dam convinced it of the "clear potential for danger." App. 125a.

After a two-week trial that included eighteen witnesses, a site visit, pre- and post-trial briefing, and post-trial argument, the Court of Federal Claims (Judge Charles F. Lettow) held that the United States owed just compensation of approximately $5.6 million for timber taken, plus an additional $176,428.34 for a regeneration program to address degraded forest habitat that will not recover on its own. On appeal to the Federal Circuit by the government and a cross-appeal by the Commission (as to the regeneration award amount), a split panel (2-1) reversed the entire judgment on a point of law. It conceived a *per se* rule that temporary government action that causes flooding and substantial damage to property can never be a taking if the government does not intend to create a permanent flooding condition. A fractured Federal Circuit subsequently denied rehearing and rehearing

en banc (7-4) in a precedential order with three written opinions. Four of the seven-judge majority that denied rehearing were silent as to their reasons.

A. The Black River Wildlife Management Area

The Management Area is located along both banks of the Black River in northeastern Arkansas. The forests in and adjacent to the Management Area are among the largest contiguous areas of bottomland hardwood forest in the Upper Mississippi Alluvial Valley. They contain diverse hardwood timber species—including nuttall, overcup, and willow oaks—that support a variety of wildlife. In particular, the bottomland hardwood forests of the Management Area provide shelter and food for migratory waterfowl that pass through the areas in the late fall and early winter on the Mississippi River flyway.

In an effort to preserve this unique habitat, the Commission purchased much of the land that constitutes the Management Area in the 1950s and 1960s. The Commission operates the Management Area as a wildlife and hunting preserve with a special emphasis on waterfowl management. Each winter, portions of the Management Area are artificially flooded to benefit wintering waterfowl and to provide recreational opportunities for waterfowl hunting. The Management Area also serves as a valuable timber resource. The Commission systematically harvests mature oak and removes unhealthy or unproductive trees to stimulate the growth of new timber and sustain a diverse habitat. With these management practices in place, the Management Area has become a premier duck hunting area. It is also a popular

location for other forms of hunting, fishing, and bird watching.

B. The Corps of Engineers' Deviations

Clearwater Lake and Dam is located upstream from the Management Area and approximately 32 miles northwest of Poplar Bluff, Missouri. Since 1948, the Corps has controlled releases of water from Clearwater Dam to regulate the flow of the Black River and reduce the flooding of lands along the river. In order to regulate the amount of water released, the Corps approved a Water Control Plan that since 1953 has specified the timing and extent of water releases. These predetermined releases mimicked the Black River's natural flow with pulses of water that typically spill over onto riparian lands and then quickly recede. However, from 1993 to 2000, the Corps implemented a series of consecutive, annually-approved deviations from its established Water Control Plan. These deviations prolonged the dam releases to benefit upstream farmers who wanted to reduce flooding on their properties that had been occurring under the approved Water Control Plan. The slower releases still flooded the Commission's Management Area and then sustained the flooding for unnatural, extended periods during six consecutive growing seasons with the effect that trees growing at lower elevations (e.g., bottomland hardwoods) were inundated at critical times when their roots needed to breathe. Moderate drought years in 1999 and 2000 prevented flooding but wiped out the trees that had lost their root systems from the prior six years' flooding.

The Commission repeatedly objected to the ongoing deviations and warned the Corps that it was causing

significant damage. The Corps nonetheless had begun working to permanently adopt similar revisions to the Water Control Plan. In a draft version of an environmental assessment, it concluded that these releases from Clearwater Dam would have no significant impact because their effects diminish at approximately the Missouri/Arkansas state line. Only after engaging in water-stage testing in 2000 and 2001 at the Commission's urging did the Corps acknowledge the harmful effects of its deviations and decide to abandon its intent to permanently change the Plan. In a March 2001 email, Colonel Thomas Holden (United States Army Corps of Engineers, Little Rock District) reported that the Corps had "confirmed that [the Commission's] contentions are correct" and described the deviations as having "significant impacts to the bottomland hardwoods in the Donaldson/Black River Wildlife Management area." App. 185a-186a; *see also* App. 125a. He further advised his colleagues that "anyone could challenge us in that [the] deviations are not in compliance with NEPA and enjoin us. Blissful ignorance of the preceding 25+ years no longer applies." App. 188a; *see also* App. 99a.

C. The Court of Federal Claims' Findings

Based on the evidence at trial, the Court of Federal Claims, having jurisdiction pursuant to 28 U.S.C. § 1491(a)(1), found that the Commission had suffered a taking for which the United States owed just compensation. App. 161a. After careful consideration of the law and the facts, the court held that "the government's temporary taking of a flowage easement over the Management Area resulted in a permanent taking of timber from that property." App. 129a. In reaching this conclusion, the Court of Federal Claims

made several important findings. Based on numerous precedents from the Supreme Court and the Federal Circuit, it first considered the character of the taking and determined that the Commission had shown that the Corps' releases constituted a taking rather than "isolated invasions that merely constitute a tort." App. 89a (internal quotes omitted). It further found that the government's deviations "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 harvest." App. 92a. The court next looked to the foreseeability of the Commission's injury and determined that "the effect of deviations in the Management Area was predictable, using readily available resources and hydrologic skills." App. 99a. Lastly, with respect to causation, the Court of Federal Claims held that the frequency and pattern of flooding demonstrated that the Corps' deviations caused the flooding in the Management Area. App. 114a. The court further determined that the timber survey conducted by the Commission served as "persuasive proof[]" that the increased flooding during the growing seasons resulted in increased timber mortality. App. 122a.

D. The Federal Circuit's Decision

The government appealed and the Commission cross-appealed to the Federal Circuit, and on March 30, 2011, a divided panel (2-1), over a strong dissent by Judge Newman, reversed the judgment of the Court of Federal Claims. In the opinion authored by Judge Dyk with Judge Whyte (sitting by designation from the U.S. District Court for the Northern District of California), the panel majority acknowledged that "if

a particular government action would constitute a taking when permanently continued, temporary action of the same nature may lead to a temporary takings claim." App. 18a (citing *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 328 (1987)). It then reached the conclusion that "cases involving flooding and flowage easements are different." App. 18a.

Relying solely on older flooding cases that discuss flowage easements, the panel majority ruled that government-induced flooding that is not inevitably recurring occupies only the category of a tort and cannot, as a matter of law, be a taking. App. 21a-22a. Applying that rule to the Commission's case, the panel majority reasoned that it "need not decide whether the flooding on the Management Area was sufficiently substantial to justify a takings remedy or the predictable result of the government's action, because the deviations were by their very nature temporary and, therefore, cannot be inevitably recurring or constitute the taking of a flowage easement." App. 22a (internal quotes omitted). Encapsulating the binary "yes it's possible/no it isn't" nature of its "permanent/temporary" test, the panel majority explained that the "[t]he condition leading to the 'intermittent, but inevitably recurring' flooding . . . must be permanent. Otherwise, it could not be 'inevitably recurring.'" App. 21a.

Judge Newman strongly disagreed and stated in her dissent that the majority's focus on the temporal aspect of the government's intrusion alone "contradicts the entire body of precedent relating to the application of the Fifth Amendment to government-induced flooding." App. 37a. Citing *Loretto v. Teleprompter*

Manhattan CATV Corp., 458 U.S. 419, 426 (1982) and other relevant precedents, she reasoned that all cases involving temporary government invasions—including flooding cases—are subject to a "complex balancing process." App. 32a. Judge Newman further explained that "no court has held that flooding damage is never compensable if the flooding is eventually stopped, whatever the injury." App. 36a. In particular, she pointed to *Cooper v. United States*, 827 F.2d 762 (Fed. Cir. 1987), as recognizing that flood-induced destruction is a permanent injury that is compensable under the Fifth Amendment. App. 35a. She also criticized the majority's singular focus on whether the Corps' flood control policy was permanent or temporary, stating:

> The question is not solely whether the Corps' departure from the flood control policy of the Water Control Manual was permanent or was abated after six years, but whether the increased flooding caused significant injury before the flooding was abated, such that, on balance, the Fifth Amendment requires just compensation.

App. 36a.

In consideration of these strongly differing opinions, the Commission requested rehearing *en banc*; however, the Federal Circuit denied both panel and *en banc* rehearing on August 11, 2011, in another markedly divided (7-4) decision. No majority opinion was given. Judge Dyk, joined by Judges Gajarsa and Linn, issued a concurring opinion reasoning that the panel majority's opinion did not create a blanket rule that would allow the federal government to avoid

takings liability for any flood-control policy that it labels as "temporary." App. 168a. Hypothetically, the concurrence posited that fifty consecutive and identical one year deviations that cause flooding "might properly be viewed as permanent or 'inevitably recurring'" if the government had adopted them with the intent to create a permanent or recurring condition. App. 169a.

Judge Moore responded in her dissenting opinion joined by Judges O'Malley and Reyna, "With all due respect, the question of whether eight years of deviations are similarly adequate is best left to the fact finder – the Court of Federal Claims." App. 174a-175a. She further pointed out that allowing the Corps' "temporary" label for its deviations to control the takings analysis "elevates form over substance and leads to untenable results with enormous future consequences." App. 171a. Judge Moore questioned: "If a [permanent] flowage easement which is terminated after eight years can be a compensable taking, why can't an eight year flowage easement or eight consecutive one year flowage easements?" App. 174a. Characterizing the majority's holding as "a rigid, unworkable, and inappropriate black letter rule," she concluded that determining whether government action constitutes a tort or a taking requires a "flexible case-by-case approach considering the character of the government action as a whole, the nature and extent of the flooding that was caused, and the resultant damage that occurred." App. 176a.

Judge Newman also authored a written dissent to the denial of the Commission's request for rehearing. In it, she agreed with Judge Moore's dissent and reiterated her previous opinion that the panel majority

has created a *per se* rule (i.e., an injury caused by temporary flooding cannot be a taking) that is "contrary to law and precedent" of the Supreme Court and Federal Circuit. App. 178a. With respect to Judge Dyk's statement that the panel majority has created no such rule, she responded that "a single judge [from the panel] cannot rewrite the words and change the ruling of the court's issued opinion. If anything, such an attempted qualification adds confusion, not clarity, to this precedential decision." App. 179a. Judge Newman added that the panel majority has also created a new rule that it is not necessary in temporary flooding cases to apply the established balancing test to determine whether a compensable taking has occurred. App. 178a-179a. She then cited *Cooper* again as an example where a taking of destroyed timber was found to have occurred although it was always understood that the Corps' project and its effect on the river would not be permanent. App. 179a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision carved out a whole category of physical invasions that the government can make without incurring liability under the Takings Clause. The Takings Clause does not exempt any kind of government action inflicting permanent injury solely because it is not permanent. The Commission petitions the Court to grant review and then reverse and remand for the Federal Circuit to review the Court of Federal Claims' trial judgment under the established analysis.

Once the concept of a physical, government taking was accepted as a claim, the law quickly recognized

that such claims must be viewed on the basis of all the particular facts and circumstances of each. The Federal Circuit's decision upends the Court's bedrock standards and grants the government authority to repeatedly invade by flooding, no matter who it injures, no matter how much damage it permanently and foreseeably causes, and no matter what the other circumstances might be, so long as the government's actions are deemed "only temporary." *E.g.*, App. 27a ("Because the deviations from the 1953 plan were only temporary, they cannot constitute a taking."); App. 169a (Dyk, J., Gajarsa, J., and Linn, J., concurring in denial of rehearing) (hinging the possibility of liability on whether the government intends to create a "permanent or recurring condition"). This decision deserves this Court's review for three reasons.

First, the Federal Circuit's decision cannot be squared with this Court's precedent and so, because of the Federal Circuit's unique jurisdiction, it topples the established Fifth Amendment protections for a large majority of landowners and users within reach of a federal flood control project.[1] *Second*, the Federal Circuit's decision threatens serious practical impacts. *Third*, this petition presents a clean vehicle, unburdened by factual disputes, to clarify that courts must consider all the facts instead of applying a one-factor analysis.

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[1] Only claims against the United States for less than $10,000, and claims against the Tennessee Valley Authority, are excluded from the Court of Federal Claims' and, thus, the Federal Circuit's exclusive jurisdiction. *See* 28 U.S.C. §§ 1295(a)(3), 1346(a)(2), 1491(a)(1), (c).

A. The Court Should Grant Review To Clarify that No Physical Invasion is Exempt from the Takings Clause Solely for Lack of Permanency.

The Federal Circuit's decision contravenes established Supreme Court precedent. This case presents the opportunity to explain that while each physical invasion is different, the Fifth Amendment suffers no *per se* rules permitting any one mode of invasion simply because the government does not permanently repeat it. That the Federal Circuit is sharply divided over this case highlights how much this Court's unifying final word is needed.

1. The Federal Circuit's Permanency Rule Conflicts with Important Takings Decisions from This Court and Lower Courts.

This Court has long recognized that the government can physically take property through temporary actions, even after only a few years of rolling or repeat government actions. In 1946, the Court found a taking in *Causby v. United States* where a one-year airport lease with six-month renewals (beginning in 1942) led to airplane overflights that partially destroyed the landowners' use and enjoyment—they could no longer raise chickens. 328 U.S. 256, 258-59 (1946); *c.f. Kimball Laundry Co. v. United States*, 338 U.S. 1, 3, 13 (1949) (requiring additional elements of compensation for a temporary taking when the government expressly condemned a laundry business on a year-to-year basis from 1942 to 1946). The Court in *Causby* held that the Court of Claims had properly found an easement taken. 328

U.S. at 267. After considering other circumstances in the case, the Court concluded that the only question left was whether the "easement taken [was] a permanent or a temporary one," because there was no real finding of fact as to whether the government intended to permanently use the airport. *Id.* at 268. Precedent, therefore, holds that analyzing whether a property interest has been permanently or temporarily taken actually goes to the proper amount of just compensation, rather than serving as a one-factor *per se* test for whether a compensable taking has occurred. *E.g.*, *Kimball Laundry Co.*, 338 U.S. at 12-14.

It is likewise well-established that the government may take property by imposing reversible flood conditions. *See United States v. Dickinson*, 331 U.S. 745, 751 (1947); *c.f. San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657-58 (1981) (Brennan, J., dissenting with Stewart, J., Marshall, J., and Powell, J.) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable."). Takings can be reversed or abandoned, rendering them temporary. *United States v. Dow*, 357 U.S. 17, 26 (1958); *see also 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."). The Federal Circuit itself once held that temporary, seasonal flooding caused by a construction blockage can take timber, even when the Corps of Engineers considers the blockage temporary and works to clear it. *Cooper v. United States*, 827 F.2d 762, 763-64 (Fed. Cir. 1987). If the damage is foreseeable, as the Court of Federal Claims found here, no precedent allows the government to physically invade and avoid just compensation solely because its actions are temporary

or because it chooses to abandon what it takes. *C.f.* App. 36a (Newman, J., dissenting).

In the context of recurring flooding, this Court recognized that "such temporary limitations are subject to a more complex balancing process to determine whether they are a taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 n.12 (1982). In the Commission's case, a member of the panel majority defended its decision by quoting a different line in *Loretto* that in flooding cases, "a taking has always been found only" in the situation of "a permanent physical occupation . . . ." App. 166a (Dyk, J., et al., concurring in denial of rehearing *en banc*). Standing alone without the rest of the opinion, one might read that line to say that a flood is only a taking when it constitutes a permanent physical occupation, as the panel majority ruled. But *Loretto* plainly says otherwise. The issue decided there was whether small cable boxes installed permanently on a building constituted a *per se* taking. *Loretto*, 458 U.S. at 426. Concluding that it did, the Court discussed flood cases—among others—and noted that permanent and exclusive floods are the only instances where a taking is always found. *Id.* at 428. In other words, only permanent and exclusive occupations constitute *per se* takings. *Loretto* made clear, as Judge Newman pointed out in dissent, that anything less requires looking at all the facts and applying a "complex balancing process." App. 178a-179a (citing *Loretto*, 458 U.S. at 436 n.12).

Even claims for regulatory takings that arise from *temporary* interferences are recognized; they just require an assessment of all the facts. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning*

Agency, 535 U.S. 302, 335 (2002). In *Tahoe-Sierra*, the Court faced a claim that a temporary building moratorium was a *per se* temporary taking. *Id.* at 318. The Court ruled that the claim must be analyzed according to the *Penn-Central* balancing test. *Id.* at 342 (citing *Penn-Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1976)). It expressly "[did] not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking . . . ." *Id.* at 337. Instead, the action's temporal scope "should not be given exclusive significance one way or the other." *Id.* The *Penn-Central* balancing test, even when applied to a temporary regulation like in *Tahoe-Sierra*, would consider as "particular[ly] significan[t]" the "economic impact of the regulation on the claimant." *Penn-Cent. Transp. Co.*, 438 U.S. at 124. If a temporary regulatory claim would consider the impact, it is astounding that the Federal Circuit refused to consider the impact of a temporary physical invasion, especially here where it wiped-out huge swaths of timber and crucial habitat managed for wildlife. *C.f. Loretto*, 458 U.S. at 433 (reiterating that physical invasions are "unusually serious" compared to regulatory interferences); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall) 166, 177-78 (1871) (reasoning that it would be "curious and unsatisfactory" if the Takings Clause were understood to allow the government to "inflict irreparable and permanent injury to any extent" because it somehow "refrain[s] from the absolute conversion of real property").

To hold that *any* form of physical invasion by the government is not protected by the Fifth Amendment based solely on its intended duration falls far short of fulfilling the purposes of 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); *see also Dickinson*, 331 U.S. at 748 ("The Fifth Amendment [Takings Clause] expresses a principle of fairness . . . ."). The Federal Circuit's decision squarely contradicts that purpose. Here, it renders irrelevant six years of actual invasions and massive, foreseeable damage. Holding that the government may freely invade temporarily by any mode allows it to do for free what *Armstrong* said the Takings Clause was designed to prevent.

2. The Federal Circuit Inferred a Separate Standard for Flood Cases by Severing Them from the Rest of This Court's Decisions.

While the Federal Circuit recognized that this Court's more recent decisions hold that temporary government action "[i]n general" can lead to a taking, it separated them from older flooding cases that discussed "inevitably recurring" floods. *See* App. 18a. The Federal Circuit then conceived a *per se* rule from those older cases and held that this rule survived every contrary modern decision of this Court addressing temporary takings like *Tahoe-Sierra* and its doctrinal predecessor in *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). Read carefully, the flooding cases just do not stand for the Federal Circuit's rule.

The *Barnes* case, on which the panel majority relied heavily, considered *all* the facts before concluding that

crop damage—which is different from the Commission's situation in that, for example, a single flood would erase a harvest—was consequential until the flooding became "inevitably recurring." *See Barnes v. United States*, 538 F.2d 865, 872 (Ct. Cl. 1976). What the Federal Circuit overlooked in the Commission's case is that *Barnes* did not address a situation of temporary government action. The Commission's situation was not before the *Barnes* court. Likewise, the *Cress* case—where the phrase "inevitably recurring" first arose—*did* find a taking and actually faced facts that established "inevitably recurring" floods. *See United States v. Cress*, 243 U.S. 316, 328 (1917); *c.f. also United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 801 (1950).

The *Sanguinetti* case—which did not find a taking—considered a host of other factors, such as the speculative nature of plaintiff's evidence and the fact that the government there had actually over-engineered its structure to *prevent* floods in rains beyond the maximum recorded. *See Sanguinetti v. United States*, 264 U.S. 146, 147 (1924). Thus, *Sanguinetti* came nowhere near to identifying any single, dispositive factor. The panel majority similiarly overstated *National By-Product*s by providing only a partial quote, ignoring the court's statement in that case that "[t]he [inevitably recurring] distinction . . . is, of course, not a clear and definite guideline. *Compare Nat'l By-Prods. v. United States*, 405 F.2d 1256, 1273 (Ct. Cl. 1969) *with* App. 20a (citing *Nat'l By-Prods.*, 405 F.2d at 1273, for the proposition that "plaintiff must establish that flooding will 'inevitably recur'").

In a footnote, the Federal Circuit additionally distinguished its own opinion in *Cooper*—the flooding precedent most factually similar to the Commission's claims. *Compare* App. 26a n.7 *with* App. 35a (Newman, J., dissenting) (discussing *Cooper*, 827 F.2d at 763-764, as "[b]inding precedent that directly contravenes the court's decision today"). In *Cooper*, 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 763-764. The Corps succeeded in clearing the blockage in 1984, but the intermittent flooding had killed the plaintiff's timber by then. *Id.* *Cooper* ruled that the government had taken the timber. *Id.* At a minimum, it plainly held that temporary government conditions that intermittently flood *can* take timber. *Cooper*, 827 F.2d at 763. Thus, *Cooper* refutes the Federal Circuit's *per se* rule in this case.

The Federal Circuit majority distinguished *Cooper* on the grounds that it "did not discuss the tort versus taking distinction." App. 27a n.7. That distinction disregards the Federal Circuit's holding that the temporary situation actually inflicted a taking. The Federal Circuit further distinguished *Cooper* on the grounds that it did not analyze whether the government appropriated a "flowage easement." App. 26a n.7. That distinction renders inapplicable the entire line of cases ruling that the government can gain a public benefit by destroying someone else's property. *See, e.g.*, *Armstrong*, 364 U.S. at 48; *see also United States v. Welch*, 217 U.S. 333, 339 (1910) (stating that if the United States only destroyed an interest in land, it "may as well be a taking as would be an appropriation for the same end"). Invoking that line of cases with Federal Circuit decisions in *Cooper*

and *Ridge Line, Inc.*, the Commission argued that even if the Corps' flooding had not appropriated a flowage easement (which it had), the Corps took its property by preempting its use and enjoyment. *See Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1356 (Fed. Cir. 2003). The Federal Circuit's treatment of *Cooper* thus avoided the Commission's preemption theory altogether and allowed the panel majority to rest its decision entirely on "inevitably recurring" language in cases like *Barnes* that actually found a taking of a permanent flowage easement.

The United States itself has never advocated for a *per se* rule. *See* App. 178a (Newman, J., dissenting) (recognizing that "[e]ven the government is uncomfortable with the court's new rule"). As appellant, it argued that the temporary nature of the government's actions was just one factor in the "correct question." App. 192a-193a. That the Federal Circuit applied a *per se* rule that not even the United States advanced as the appellant and treated older flooding cases like *Cress*, *Sanguinetti*, and *Barnes* as dispositive and superseding even later decisions shows how much this Court's reasoned clarity is needed. If each mode of invasion takes the parties down a separate rabbit-hole with its own constitutional precepts, no one can reasonably predict where it will go.

B. The Federal Circuit's Decision Threatens Serious Implications of Unrestricted Government Authority for Temporary Flood Control.

By divining a one-factor rule for flooding, the Federal Circuit carved out a whole category of physical invasions from the Takings Clause's protections.

There is no reasonable way to read the panel majority's decision except as declaring, as a matter of law, that the Takings Clause does not provide compensation when temporary government actions cause flooding that eventually stops. The court squarely ruled that it did not have to consider whether the government's flooding "was sufficiently substantial to justify a takings remedy or the predictable result of the government's action," because the government's actions were "temporary." App. 22a (internal quotes omitted); *see also* App. 23a ("[W]e 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."); *c.f. also* App. 36a-37a (Newman, J., dissenting); App. 171a-173a (Moore, J., O'Malley, J., Reyna, J., dissenting).

The Federal Circuit's permanency rule means that the government may temporarily manipulate flooding regimes to benefit anyone it chooses and cause substantial, foreseeable damage to others without ever paying just compensation. The Constitution has never endured any such rule, and for good reason. The government is already immune in tort for damages caused by flood control projects. *See* 33 U.S.C. § 702c; *but see Cent. Green Co. v. United States*, 531 U.S. 425, 436 (2001); *United States v. Sponenbarger*, 308 U.S. 256, 264-70 (1939). Thus, under the Federal Circuit's ruling, the Corps need only refuse to make a decision on how it will act even one year from now to avoid any liability. *See* App. 171a (Moore, J., et al. dissenting) ("To allow the government's 'temporary' label for the release rate deviations to control the disposition of this case elevates form over substance and leads to untenable results with enormous future

consequences."). This potentially affects everyone and everything, including wildlife and habitat, that lies up- or downstream of a federal flood control project.[2]

In the Commission's case, its damages include more than $5.6 million worth of timber, $176,428 worth of regeneration costs, and the loss of crucial bottomland hardwood habitat used by migratory birds, wildlife, and recreationists. The Federal Circuit should have to confront the question of whether the government may occupy the Commission's property and inflict such massive and foreseeable damage over the course of eight years without paying just compensation. So far it has not, outside the dissenting opinions of four of its judges who would have found a taking. App. 36a ("No error has been shown in the trial court's view of the facts and law."), App. 172a ("There is no error in [the trial court's] decision.").

C. The Federal Circuit's Permanency Rule is a Legal Issue that is Cleanly Presented for This Court's Review.

The legal issue here is narrow and cleanly presented. Though the Court of Federal Claims compiled an extensive record in this case and made numerous factual findings, on appeal only the dissenting opinions considered all the facts and the merits of the trial court's judgment. *See* App. 36a (agreeing that the Court of Federal Claims properly

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[2] While the Tennessee Valley Authority is excepted from the Court of Federal Claims and, thus, Federal Circuit's exclusive jurisdiction, this decision is at least highly persuasive for those takings claims.

ordered the United States to pay just compensation), App. 172a (same); *c.f. also* App. 30a (Newman, J., dissenting from panel majority, stating that her "colleagues [on the panel] do not dispute" the lower court's findings of permanent damage, preemption of use, and foreseeability), App. 171a (Moore, J., et al. dissenting) ("The facts of this case are quite simple."). The panel majority did not consider any facts other than the temporal scope of the flooding. Thus, the physical takings issue presented for this Court's review is a narrow question of law, not burdened by factual disputes or collateral issues. *C.f.* App. 176a (Moore., J., et al., dissenting from denial of rehearing *en banc* "[b]ecause we miss the opportunity to correct this error of law"). The Commission asks only that the Court instruct the Federal Circuit to consider all the facts and apply the complex balancing test prescribed for claims that fall short of a *per se* taking.

CONCLUSION

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

Respectfully Submitted,

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