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* NATIONAL ASSOCIATION OF HOME BUILDERS AND THE AMERICAN FOREST RESOURCE COUNCIL SUPPORTING PETITIONER

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December 9, 2011

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INTEREST OF THE *AMICI CURIAE*

NAHB[1] is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent and affordable housing. As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority.

Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 160,000 members are home builders and/or remodelers, and its builder members construct about 80 percent of the new homes built each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife,* 551 U.S.

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1 Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. The parties have given consent and the letters of consent to file this brief are attached. 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. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

644 (2007). It also has participated before this Court as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by excessive regulation under a wide array of statutes and regulatory programs. *See* Appendix A.

NAHB's organizational policies have long advocated that property owners must be able to bring inverse condemnation claims in response to government invasions of their property. As property owners, NAHB members often confront the physical impacts to their land of federal and state government action.

American Forest Resource Council (AFRC) is an Oregon nonprofit corporation that represents the forest products industry throughout Oregon, Washington, Idaho, Montana, and California. AFRC represents over 50 forest product businesses and forest landowners. AFRC's mission is to create a favorable operating climate for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, and policies regarding management of forest lands. AFRC members have a great interest that their forest lands not be taken without just compensation and have asserted their property rights in takings cases involving government regulation of forest lands for spotted owls.

The Court should grant certiorari to clarify that temporary physical occupations, including flooding, can result in a compensable taking. Correcting the

Federal Circuit's ruling with respect to temporary flooding will eliminate the current confusion over temporary physical occupations and just compensation requirements under the Takings Clause.

SUMMARY OF ARGUMENT

This matter presents an excellent opportunity to clarify federal takings law as it relates to temporary physical takings. A wide variety of courts have required just compensation where temporary physical occupations severely impact a property owner's land. The Court, however, has not yet articulated a clear test or explained how the permanent physical takings test in *Loretto v. Teleprompter Manhattan CATV Corp. et al.,* 458 U.S. 419 (1982) is to be applied to temporary physical occupations.

Precedent from both the Court and lower courts strongly suggests that the severity and duration of the occupation should be weighed to determine whether a temporary physical occupation results in a taking. Thus, "[the] imposition should be subject to the 'more complex balancing process' that *Loretto* explained should be applied to temporary physical takings. That process would consider . . . the degree of the imposition and its duration." Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions,* 11 Vt. J. Envtl. L. 479, 508 (Spring 2010).

By creating a *per se* rule that temporary flooding can only result in a taking when it is inevitably recurring, the Federal Circuit's decision runs directly counter to this precedent and eviscerates long-held physical takings principles.

ARGUMENT

I. THE COURT SHOULD CLARIFY THE CIRCUMSTANCES UNDER WHICH A TEMPORARY TAKING CAN OCCUR

While much ink has been spilled regarding the complexities of regulatory takings, physical takings analysis has not received the same attention from the Court. Many courts and commentators appear content to limit the physical takings analysis to the Court's decision in *Loretto,* 458 U.S. 419 (1982). Namely, that "where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 538 (2005).

As the decision below shows, however, courts have struggled with the application of this rule where an occupation is temporary but causes permanent damage to property. For this reason, courts have been left to apply *ad hoc* tests, resulting in inconsistent decisions.[2] This case presents the perfect opportunity to clarify past decisions and explain how *Loretto*, and related decisions, are to be applied to temporary takings.

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[2] *Compare McKay v. United States,* 199 F.3d 1376 (Fed. Cir. 1999) (installation of ground water monitoring wells for period of years is a physical taking) *with Ramsey Winch Inc. v. Henry,* 555 F.3d 1199 (10th Cir. 2009) (prohibiting property owner from excluding others does not create physical taking).

A. The Court Has Determined That a Temporary Physical Occupation Can Result in A Compensable Taking

Even prior to *Loretto,* the Court has determined that many temporary physical occupations are compensable takings under the Fifth Amendment. In fact, the Court determined that a taking occurred in a trilogy of cases involving the occupation of property by the federal government during World War II. *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. Gen. Motors Corp.,* 323 U.S. 373 (1945). In this line of cases, the Court found that the government must pay just compensation for takings that were temporary in duration, but total and complete in nature.

In *Kimball Laundry,* the military used and occupied property owner's laundry business. 338 U.S. at 5. The Court explained that "when the Government has taken the temporary use of such property, it would be unfair to deny compensation for a demonstrable loss of going-concern value upon the assumption that an even more remote possibility—the temporary transfer of going-concern value—might have been realized." *Id.* at 15. In *Gen. Motors Corp.* the Court went further, holding that "taken" within the Fifth Amendment includes not only substitution of ownership but deprivation of ownership including damage to, depreciation of, and destruction of property. 323 U.S. at 380.

Despite these early cases, when the Court next addressed the physical takings issue in *Loretto*, it

only addressed temporary physical encroachments in dicta. The Court first explained that temporary physical occupations are not *per se* takings. Using intermittent flooding cases as an example, the Court explained that "such temporary limitations are subject to a more complex balancing process to determine whether they are a taking." 458 U.S. at 436 n.12.

The Court's most recent explanation of temporary physical takings occurred in the context of a regulatory takings case. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987), the Court expounded upon the existence of temporary physical takings as part of its analysis of temporary regulatory takings.

The Court first acknowledged that the World War II line of cases stood for the principle that compensation is required for the government's temporary interference with the use of property. *Id.* at 318. The majority explained that these physical occupation cases meant "that 'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.*

In their dissent, Justices Stevens, Blackmun, and O'Connor took this analysis of temporary physical takings even further. They explained:

> "[I]f the government appropriates a leasehold interest and uses it for a public purpose, the return of the premises at the expiration of the lease would obviously not erase the fact of the government's temporary occupation. Or if the government destroys a chicken farm by building a road through it or flying planes over it, removing the road or terminating the flights would not palliate the physical damage that had already occurred. These examples are consistent with the rule that even minimal physical occupations constitute takings which give rise to a duty to compensate."

Id. at 329. Thus, the Court has clearly stated that temporary physical occupations can result in compensable Fifth Amendment takings. Unfortunately, these statements have largely been in the context of dicta and have not resulted in the formulation of a broadly applicable rule. A decisive holding here would help to define and narrow the still nascent temporary physical takings doctrine.

B. Both Physical Impact and the Length of Occupation Are Relevant to A Temporary Physical Takings Analysis

It would be incorrect to assert that all temporary physical occupations should be treated as *per se* takings. Opinions from both the Court and lower courts point to a middle ground based on the amount of damage caused by a physical occupation and its duration. The Federal Circuit's opinion below,

however, stands in stark contrast to this line of precedent by dismissing both the physical effects and duration of flooding on the Petitioner's land. This results in yet another *per se* rule to be applied to some, but not all, temporary flooding cases.[3]

Where the amount of damage or the nature of an occupation is substantial, courts should find that a temporary physical taking has occurred. Commentators have suggested that these cases stand for the principle that "where an imposition is temporary, it is considerably more likely to be seen as a taking if the occupation or appropriation is total as opposed to partial." 11 Vt. J. Envtl. L. 479 at 506 (2010).

The Federal Circuit employed this analysis in *McKay v. United States*, 199 F.3d 1376 (Fed. Cir. 1999). In that case, the court examined the extent of physical and monetary damage caused by government ground water monitoring wells placed on the property owner's land. The fact that the wells damaged the owner's mineral estate was an important element of the court's determination that a physical taking had occurred. *Id.* at 1381.

Yet the Federal Circuit refused to apply these principles in the context of severe, yet temporary

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[3] The Court has urged caution in the creation of *per se* rules in the context of the Takings Clause. *See Palazzolo v. Rhode Island et al.,* 533 U.S. 606, 636 (2001) ("The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.").

flooding. Relying instead on antiquated flowage easement cases, the court determined that only inevitably recurring flooding could result in a temporary physical taking. *Arkansas Game & Fish Comm'n,* 637 F.3d 1366, 1374 (Fed. Cir. 2011). This reasoning, however, ignores the very real physical and economic effects that most flooding has on property.

Thus, the intensity of the occupation is an important factor that should govern whether a physical taking has occurred. When the degree of intrusion is sufficiently intense, it will result in a taking. In other words, the intrusion "actively materially and substantially interferes with the plaintiff's use and enjoyment of his property." *Otay Mesa Property L.P. et al. v. United States,* 86 Fed. Cl. 774, 786 (Fed. Cl. 2009).

The length of a temporary occupation is closely tied to the intensity of the occupation. The Federal Circuit has explained that "permanent does not mean forever, or anything like it. The Government's physical occupation is permanent if the intrusion is a substantial physical occupancy of private property. The occupation need not be exclusive, or continuous and uninterrupted to constitute a taking." *Hendler v. United States,* 952 F.2d 1364, 1376 (Fed. Cir. 1991). Therefore, the intensity of an occupation must be balanced with the duration or frequency of an occupation in order to determine whether a temporary physical occupation results in a taking.

In other words, where an invasion is temporary but substantial in nature, it is distinguishable from cases like *Pruneyard Shopping Ctr. v. Robins,* 447 U.S. 74 (1980), where the physical impact was far less significant. Courts should weigh both factors in order to determine whether temporary flooding rises to the level of a physical taking:

> Flooding is a direct physical entry and use by the government . . . [T]he extent of impairment, like the duration of the intrusion, is not irrelevant. The greater the impairment, the more compensation required. If the owner's use of the property is not impaired at all, then maybe no compensation should be required. But that is not because the land was not taken. It is because justice may not require compensation for a taking that does not impair the owner's use at all.

Alan Romero, *Takings by Floodwaters,* 76 N.D. L. Rev. 785, 798 (2000). In other words, property owners who have been subject to flooding caused by government action deserve at least the chance to prove a takings claim. By creating a *per se* rule that temporary flooding can never result in a taking, the Federal Circuit has eviscerated the Just Compensation Clause.

Further, some courts, including this Court, have applied this analysis to acknowledge that just compensation is required that the context of temporary flooding cases. *See, e.g. Fitzpatrick v. Okanogan County,* 238 P.3d 1129, 1138 (Wash. 2010) (allowing inverse condemnation claim for damage

resulting from temporary flooding); *United States v. Cress,* 243 U.S. 316, 328 (1917) ("[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question [of] whether it is a taking."); *St. Bernard Parish v. United States,* 88 Fed. Cl. 528, 551 (Fed. Cl. 2009) (Fifth Amendment taking can occur in the context of flooding caused by public works).

In the case below, land was flooded over the course of six years and the government's decisions with respect to the flooding destroyed vast swaths of timber on the land. Thus, both the duration and the nature of the physical invasion suggest a physical taking. Yet the Federal Circuit ignored these results in order to arrive at a *per se* test that eliminates the just compensation remedy in a large number of flooding cases.

CONCLUSION

For the reasons stated above, the Court should grant certiorari and reverse the decision of the United States Court of Appeals for the Federal Circuit.

DATED: December 9, 2011.

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APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825 (1987); *Pennell v. City of San Jose,* 485 U.S. 1 (1988); *Yee v. City of Escondido,* 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council,* 505 U.S. 1003 (1992); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.,* 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Franconia Assocs. v. United States,* 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005); *Kelo v. City of New London,* 545 U.S. 469 (2005); *S.D. Warren Co. v. Me.*

APPENDIX A

Bd. of Envtl. Prot., 547 U.S. 370 (2006); *Rapanos v. United States,* 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife,* 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States,* 551 U.S. 130 (2008); *Summers v. Earth Island Inst.,* 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Prot. Agency*, 129 S. Ct. 1498 (2009); and *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009); *Monsanto v. Geertson Seed Farms,* 130 S. Ct. 2743 (2010); *United States v. Tohono O'odham Nation,* 559 F.3d 1284 (Fed. Cir. 2009), *cert. granted* 130 S. Ct. 2097 (2010) (No. 09-846); *Am Elec. Power Co., Inc. v. Connecticut,* 582 F.3d 309 (2d Cir. 2009), *cert. granted,* 131 S. Ct. 813 (2010) (No. 10-174); *Sackett v. United States Envtl. Prot. Agency,* 622 F.3d 1139 (9th Cir. 2010), *cert. granted,* 2011 WL 675769 (June 28, 2011) (No. 10-1062).