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In the United States Court of Appeals For the Federal Circuit

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VIRGINIA MILTON, and, ARNOLD MILTON, on Behalf of Themselves and All Other Similarly Situated Persons, et al.,
Plaintiffs-Appellants

TRAVELERS EXCESS AND SURPLUS LINES COMPANY,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

Appeals from the United States Court of Federal Claims in Nos. 1:17-cv-01189-LAS, 1:17-cv-01191-LAS, 1:17-cv-01195-LAS, 1:17-cv-01206-LAS, 1:17-cv-01215-LAS,

1:17-cv-01216-LAS, 1:17-cv-01232-LAS, 1:17-cv-01235-LAS, 1:17-cv-01300-LAS, 1:17-cv-01303-LAS, 1:17-cv-01332-LAS, 1:17-cv-01391-LAS, 1:17-cv-01393-LAS, 1:17-cv-01394-LAS, 1:17-cv-01395-LAS, 1:17-cv-01396-LAS, 1:17-cv-01397-LAS, 1:17-cv-01398-LAS, 1:17-cv-01399-LAS, 1:17-cv-01408-LAS, 1:17-cv-01423-LAS, 1:17-cv-01427-LAS, 1:17-cv-01428-LAS, 1:17-cv-01430-LAS, 1:17-cv-01433-LAS, 1:17-cv-01434-LAS, 1:17-cv-01435-LAS, 1:17-cv-01436-LAS, 1:17-cv-01437-LAS, 1:17-cv-01438-LAS, 1:17-cv-01439-LAS, 1:17-cv-01450-LAS, 1:17-cv-01451-LAS, 1:17-cv-01453-LAS, 1:17-cv-01454-LAS, 1:17-cv-01457-LAS, 1:17-cv-01458-LAS, 1:17-cv-01461-LAS, 1:17-cv-01512-LAS, 1:17-cv-01514-LAS, 1:17-cv-01515-LAS, 1:17-cv-01516-LAS, 1:17-cv-01517-LAS, 1:17-cv-01518-LAS, 1:17-cv-01519-LAS, 1:17-cv-01520-LAS, 1:17-cv-01521-LAS, 1:17-cv-01522-LAS, 1:17-cv-01523-LAS, 1:17-cv-01524-LAS, 1:17-cv-01525-LAS, 1:17-cv-01545-LAS, 1:17-cv-01555-LAS, 1:17-cv-01564-LAS, 1:17-cv-01565-LAS, 1:17-cv-01566-LAS, 1:17-cv-01567-LAS, 1:17-cv-01577-LAS, 1:17-cv-01578-LAS, 1:17-cv-01588-LAS, 1:17-cv-01625-LAS, 1:17-cv-01645-LAS, 1:17-cv-01646-LAS, 1:17-cv-01647-LAS, 1:17-cv-01653-LAS, 1:17-cv-01679-LAS, 1:17-cv-01680-LAS, 1:17-cv-01681-LAS, 1:17-cv-01682-LAS, 1:17-cv-01683-LAS, 1:17-cv-01684-LAS, 1:17-cv-01685-LAS, 1:17-cv-01686-LAS, 1:17-cv-01688-LAS, 1:17-cv-01689-LAS, 1:17-cv-01748-LAS, 1:17-cv-01814-LAS, 1:17-cv-01822-LAS, 1:17-cv-01828-LAS, 1:17-cv-01833-LAS, 1:17-cv-01834-LAS, 1:17-cv-01882-LAS, 1:17-cv-01948-LAS, 1:17-cv-01949-LAS, 1:17-cv-01954-LAS, 1:17-cv-01972-LAS, 1:17-cv-02003-LAS, 1:17-cv-09002-LAS, 1:17-cv-16522-LAS, 1:18-cv-00142-LAS, 1:18-cv-00144-LAS; 1:18-cv-00168-LAS, 1:18-cv-00169-LAS, 1:18-cv-00230-LAS, 1:18-cv-00230-LAS, 1:18-cv-00243-LAS, 1:18-cv-00244-LAS, 1:18-cv-00308-LAS, 1:18-cv-00318-LAS, 1:18-cv-00319-LAS, 1:18-cv-00321-LAS, 1:18-cv-00322-LAS, 1:18-cv-00338-LAS, 1:18-cv-00339-LAS, 1:18-cv-00341-LAS, 1:18-cv-00344-LAS, 1:18-cv-00346-LAS, 1:18-cv-00347-LAS, 1:18-cv-00348-LAS, 1:18-cv-00349-LAS, 1:18-cv-00389-LAS, 1:18-cv-00463-LAS, 1:18-cv-00518-LAS, 1:18-cv-00685-LAS, 1:18-cv-

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REPLY BRIEF OF APPELLANTS

FLEMING, NOLEN & JEZ, LLP
Rand P. Nolen
2800 Post Oak Blvd., Suite 4000
Houston, TX 77056
(713) 621-7944
(713) 621-9638 (Fax)

BECK REDDEN LLP
Russell S. Post
David M. Gunn
Parth S. Gejji
1221 McKinney, Suite 4500
Houston, TX 77010
(713) 951-3700
(713) 951-3720 (Fax)

COUNSEL FOR APPELLANTS IN 128 APPEALS

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ARGUMENT IN REPLY

I. The property interest at stake is a flowage easement.

The first question is whether Appellants have a cognizable property interest, which is an issue of state law. *See* Govt Br. at 18. This question should be simple: A flowage easement is a cognizable property interest in state law, and Appellants contend that flowage easements were taken by the Government.

Appellants' brief quoted from Judge Lettow's ruling in the upstream cases, which found the relevant property rights to be flowage easements. App. Br. at 21. Appellants established that Texas law recognizes flowage easements, *id*. at 22-24, and that Texas' highest court has reinforced this point by awarding damages to flooding victims for the taking of a flowage easement. *Id*. at 25-29. Those Texas authorities ought to end the inquiry, given the Government's concession in the court below that the Appellants "allege a deprivation" of a "flowage easement." Appx535-36.

Yet the Government declines to address flowage easements. It relegates Judge Lettow's ruling to a footnote and never attempts to show where he erred in finding a flowage easement as the relevant property interest. Govt Br. at 2-3 n.1. After that one footnote, the Government never discusses flowage easements again. Flowage easements are as rare in its brief as Alfred Hitchcock sightings in an Alfred Hitchcock film.

Instead, the Government accuses Appellants of seeking a property interest in "maximum protection" against flooding. Govt Br. at 19; *see also id.* at 22, 28 (referring to "maximum flood control" and "maximum protection"). This is the straw man that the CFC foisted on the Government, but it cannot be defended. Therefore, the Government quickly retreats to issues the CFC never reached.

A. Flowage easements are well established in state law, as confirmed by *Tarrant Regional* and *Brazos River*.

The Government does not deny that state law recognizes flowage easements. Nor does the Government dispute what it accepted as "indisputable" 60 years ago, namely the principle that "a flowage easement is 'property' within the meaning of the Fifth Amendment." *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 627 (1961). Has this "indisputable" rule changed since 1961?

The authoritative pronouncements about state property interests appear in two cases: *Tarrant Regional Water District v. Gragg*, 151 S.W.3d 546 (Tex. 2005), and *Brazos River Authority v. City of Graham*, 354 S.W.2d 99 (Tex. 1961). There, the state supreme court did more than recognize flowage easements in the abstract. It awarded damages to flooded property owners in exchange for flowage easements being granted to the entities that brought about the flooding. This result is evident from the face of each judgment.

The Government says almost nothing about these supreme court decisions. Instead, it cites a line of cases from one lower court that does not concern the property element, but the test for a taking under state law. *See* Govt Br. at 20 (citing the progeny of *Wickham v. San Jacinto River Authority*, 979 S.W.2d 876 (Tex. App.—Beaumont 1998, pet. denied)). That argument erroneously conflates the takings element with the property element.

The takings element presents a question of federal law, upon which the opinion of the Beaumont Court of Appeals carries no weight. One could have a warm debate about how *Wickham* handled the takings element under state law—and litigants in state-court cases are pursuing that debate because *Wickham* departs from the rest of state law—but this is not the place to debate the takings element. *Wickham* has nothing to do with the nature of the state property interest.

The Government claims that the Act of God defense found in negligence law furnishes a "helpful analogy." Govt Br. at 14. Citing *McWilliams v. Masterson*, 112 S.W.3d 314 (Tex. App.—Amarillo 2003, pet. denied), a car wreck case about a driver who encountered cattle on an icy highway, the Government observes that a tort defendant is not liable for an injury caused by an Act of God. Govt Br. at 21. This discussion of negligence law has no bearing on state property rights.

Again evading the property issue, the Government notes that liability failed in *Harris County Flood Control District v. Kerr*, 499 S.W.3d 793 (Tex. 2016). That case involved a takings claim under the Texas Constitution; liability failed because there was insufficient evidence of the intent element required by state law, not for want of a property right. *See id.* at 806 ("the record is devoid of evidence the County knew, at the time it allegedly approved of 'unmitigated' development, that the homeowners' particular properties would suffer from recurrent flooding"). The property element had no role in *Kerr*. *See id.* at 797 (describing the issues as "intent, causation, and public use").

The lesson of *Tarrant Regional* and *Brazos River* (that flowage easements are cognizable and compensable property interests under state law) largely answers the discussion of police power. *See* Govt Br. at 19-22. Police power limitations do exist in state law, but they do not furnish the Government a free flowage easement to be taken on demand. If the Government were correct, *Tarrant Regional* and *Brazos River* would have come out the other way.

B. The flowage easement stick is not lost from the "bundle of sticks" if property is conveyed after the birth of a federal project.

Next, the Government argues that "property interests are limited by the owners' expectations as of the date they acquired their properties." Govt Br. at 22. This argument is factually unfounded, as none of the downstream property owners knew the Government might flood their properties. *See* App. Br. at 5-7.

In addition, the argument is legally invalid. Under the Government's theory, if a federal flood-control project declares the right to impose a flowage easement on a neighborhood as of April 1, any homeowners who buy property in the neighborhood after April 1 must accept the easement as a limitation on their property rights—whereas everyone who bought a home beforehand would retain the right to compensation for the easement's taking. *See* Govt Br. at 23 (contending that Appellants "purchased their properties between 1976 and 2015" and lack a property right because they purchased "after the Project was constructed and the first Water Control Manual adopted"). Hence, the Government reasons, newcomers are burdened by the flowage easement.

What happened to the easement "stick" in the proverbial "bundle of sticks"? In the Government's view, the flowage easement stick mysteriously disappeared by the time the bundle passed to the new owners.

This notion of a vanishing easement was rejected by Justice Scalia in *Nollan*, where the property owners bought their land after California had declared its right to an easement over their beachfront land:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Nollan v. California Coastal Comm'n, 483 U.S. 825, 883 n.2 (1987).

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Supreme Court again rejected the "single, sweeping, rule" that "[a] purchaser or a successive title holder ... is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Id*. at 626. On the contrary, actions constituting a taking "do not become less so through passage of time or title." *Id. at* 627.

In fact, *Palazzolo* amplified the point to make sure that no one would miss it: "Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Id*.

In short, a takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id.* at 630.

C. The Flood Control Act of 1928 cannot trump the Takings Clause.

Finally, the Government urges a flooding exception to the Fifth Amendment based on the Flood Control Act of 1928, 33 U.S.C. § 702c. *See* Govt Br. at 24-27. In *United States v. James*, 478 U.S. 597 (1986), section 702c of the Act was held to bar personal injury claims arising from a negligent failure to warn about the dangers of recreational activities in federal reservoirs.

Section 702c has no bearing on the scope of property rights under state law. As the Government's counsel (Andrew Pincus) said to then-Justice Rehnquist during oral argument in *James*, "no one claims that the provision bars actions for damages required by the Fifth Amendment."

The Government now suggests otherwise, claiming the property rights at stake should be "understood against the backdrop of Section 702c." Govt Br. at 25. Contrary to that view, "the property rights protected by the Takings Clause are creatures of state law." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021). Those rights existed prior to 1928, and Congress has no constitutional power to limit them by statute. As Justice Scalia stated during the oral argument in *Arkansas Game*: "I mean, that's nice that Congress doesn't want to be liable," but Congress "can't overrule the Takings Clause." Similarly, in the words of the first Justice Harlan, "Congress may not override the provision that just compensation must be made when private property is taken for public use." *Scranton v. Wheeler*, 179 U.S. 141, 153 (1900); *see also Monongahela Nav. Co. v. United States*, 148 U.S. 312, 336 (1893) (Congress "must proceed subject to the limitations imposed by this fifth amendment, and can take [private property] only on payment of just compensation").

The decision below was erroneous, and it should be reversed. The Court may either remand the case for further proceedings or reach the unaddressed issues raised by the parties' respective briefs.

II. The Government's intentional decision to take a flowage easement—both permanently through its Manual and temporarily through its decision to flood downstream properties—constitutes a taking.

It is not necessary for this Court to decide any issue beyond the existence of a state-law property interest, but should the Court decide to reach the other issues, it should hold that the Government took a flowage easement as a matter of law. There are two independent grounds for this conclusion.

A. The Manual takes a permanent, categorical flowage easement.

This case is different from other cases about government-induced flooding because the flooding resulted from an official government policy memorialized in the Corps of Engineers' Water Control Manual. That Manual meets all the criteria for a permanent, categorical taking of a flowage easement. App. Br. at 36-39. Recent developments reinforce this conclusion.

1. *Cedar Point* confirms the categorical taking analysis.

This summer, the Supreme Court held that a permanent, categorical taking occurs when the Government decrees a right to invade an owner's private property. In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), the Court held that a state regulation requiring private property owners to allow union organizers access to their property was a *per se* physical taking. *Id*. at 2080. *Cedar Point* reaffirms several principles that are central to this case.

First, because the right to exclude others is "'one of the most essential sticks in the bundle of rights that are commonly characterized as property,'" *id*. at 2072 (citation omitted), the Court treats "government-authorized physical invasions as takings requiring just compensation." *Id*. at 2073. "The Court has often described the property interest taken as a servitude or an easement." *Id*. Put another way, "servitude" and "easement" are terms used to describe a right to invade property, and it is settled that "appropriation of an easement constitutes a physical taking." *Id*. (citing cases).

Second, it makes no difference that the Government created this easement by publishing it in the form of an "Induced Surcharge Flood Control Regulation." The effect is the same. "Government action that physically appropriates property is no less a physical taking because it arises from a regulation." *Id*. at 2072. "Whenever a regulation results in a physical appropriation of property," therefore, "a *per se* taking has occurred." *Id*.

Taken together, these principles establish that a regulation that appropriates "a right to invade the [owners'] property … constitutes a *per se* physical taking." *Id*. at 2072; *see also id*. at 2074 (holding that the state regulation in question "appropriates a right to physically invade the [private] property," which constitutes "a *per se* physical taking under our precedents").

Third, such a taking may occur if the Government invades property in ways that an owner could not practically exclude—such as "invasion of private property by overflights," *id*. at 2073 (citing *United States v. Causby*, 328 U.S. 256 (1946)), or "assertion of a right to fire coastal defense guns across private property." *Id*. (citing *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922)). Even if the property owner could not resist, the invasion is a taking.

Fourth, it is the assertion of a governmental right to invade private property, and not the frequency with which that right is exercised, that constitutes a taking. Thus, "a physical appropriation is a taking whether it is permanent or temporary," *id*. at 2074, and "physical invasions constitute takings even if they are intermittent as opposed to continuous." *Id*. at 2075. "The fact that a right to take access is exercised only from time to time does not make it any less a physical taking." *Id*.

Fifth, a right to invade private property is not subject to the balancing test that governs regulatory takings. *Id*. at 2076-77. "Our cases establish that appropriations of a right to invade are *per se* physical takings, not use restrictions subject to *Penn Central*" and its test for regulatory takings. *Id*. at 2077. Therefore, if the Government takes a right to invade private property, courts need not consider any other factors. Protected property rights "cannot be balanced away." *Id*.

Finally, treating a governmental right of access as a *per se* physical taking "does nothing to efface the distinction between trespass and takings." *Id*. at 2078. The Government stands on that distinction here. But as *Cedar Point* explained, trespass cases involve situations in which there was no preexisting right of access: "Isolated physical invasions, *not undertaken pursuant to a granted right of access*, are properly assessed as individual torts…." *Id*. (emphasis added). In this case, Section 7-05(b) of the Water Code Manual announces a "granted right of access." That distinction makes all the difference.

Most government-induced flooding cases do not involve a "right of access," but a governmental action that unintentionally caused flooding on private property. In those cases, the multi-factor test of *Arkansas Game* represents "an application of the traditional trespass-versus-takings distinction to the unique considerations that accompany temporary flooding." *Id*. at 2079. But this case is materially different. Because it involves a regulation that declares a "right of access," it is subject to the same rules that govern every easement imposed by regulation. "As in those cases, the government here has appropriated a right of access to the [owners'] property," which constitutes "a *per se* physical taking." *Id*. at 2074. These facts trigger what the Supreme Court calls its "traditional rule: Because the government appropriated a right to invade, compensation [is] due." *Id*. at 2076.

2. The Government's answers are unavailing.

Curiously, the Government virtually ignores the categorical taking analysis. Although Appellants featured this argument as their lead theory, App. Br. at 36-38, the Government shunts it to the back of the brief. Govt Br. at 55-57.

First, the Government argues that temporary flooding is not a *per se* taking. Govt Br. at 55-56. That is true only in the absence of "a granted right of access." *Cedar Point*, 141 S. Ct. at 2078. Where the Government grants a "right of access," as Section 7-05(b) of the Water Code Manual does, it takes a permanent easement. *See* p. 11, *supra*. Indeed, the cases cited by the Government establish the principle that a right to invade private property constitutes a *per se* physical taking. *Id*.; *Cedar Point*, 141 S. Ct. at 2072-74. In other words, there is nothing "temporary" about the right to invade property claimed by Section 7-05(b); the Government can (and will) flood downstream properties whenever the Manual deems it appropriate.

Second, the Government argues that Section 7-05(b) does not grant a "permanent" right to invade the downstream owners' property, but only authorizes "temporary and limited" invasions subject to the *Arkansas Game* balancing test. Govt Br. at 56-57. On the contrary, an easement represents a permanent invasion of the right to exclude, even if it is only exercised occasionally. *See* p. 10, *supra*. "The fact that a right to take access is exercised only from time to time does not make it any less a physical taking." *Cedar Point*, 141 S. Ct. at 2075.

For this reason, *Cedar Point* forecloses the Government's argument that its assertion of the right to invade private property is subject to a balancing analysis. *Id*. at 2076-78. *Cedar Point* rejected the state's reliance on the very passage from *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 n.12 (1982), upon which the Government relies. *Compare* Govt Br. at 56-57 *with Cedar Point*, 141 S. Ct. at 2074-75. The proper classification turns on whether an invasion is "undertaken pursuant to a granted right of access." *Cedar Point*, 141 S. Ct. at 2078. If not, the case falls under the rule that "[n]ot every physical *invasion* is a taking," *id*. at 2074-75 (quoting *Loretto*), so it is subject to a balancing analysis. But if the invasion occurs pursuant to a "right of access," it is a *per se* taking. *Id*. at 2078. This case falls into the latter category. The right to invade private property granted by Section 7-05(b) of the Manual constitutes a *per se* physical taking. That right is permanent and it falls squarely within the rationale of *Cedar Point*.

In truth, as *Cedar Point* explained, the Government's arguments about the temporary and intermittent nature of its releases during Tropical Storm Harvey "bear[] only on the amount of compensation." *Id*. at 2074. For liability purposes, Section 7-05(b) grants the Government a right to invade private property under certain circumstances. Regardless of the frequency and duration of its exercise, that right of access constitutes a *per se* physical taking. *Id*. at 2072-73.

B. In addition, the Government took a temporary flowage easement under the *Arkansas Game* test.

Independently, the Court should hold that the Government temporarily took a flowage easement when it intentionally flooded the downstream property owners. This claim is governed by *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012). App. Br. at 39-48.

The Government focuses its brief on the second and fourth elements of the *Arkansas Game* balancing test—intent and severity—but it recasts those elements in the language of *Ridge Line, Inc v. United States*, 346 F.3d 1346 (Fed. Cir. 2003). Govt Br. at 40-42. Its claim that *Arkansas Game* "cited *Ridge Line* with approval," *id*. at 42, overstates a solitary "*see also*" citation. *Arkansas Game*, 568 U.S. at 522. *Cedar Point* makes it clear that *Arkansas Game* now provides the authoritative test. *Cedar Point*, 141 S. Ct. at 2078-79.

1. The challenged government action is the decision to open the floodgates.

As a threshold matter, it is crucial to identify the government action at issue. Appellants contend that the Government took a temporary flowage easement when it deliberately chose to open the floodgates and inundate downstream properties—not that it did so by constructing and operating the Addicks and Barker Reservoirs prior to the events in question. The Government refuses to confront this claim on its own terms.

Correct disposition of this claim requires careful attention to the record and the standard of review—which requires this Court to take Appellants' allegations and summary judgment evidence as true. The record establishes a series of facts that frame the temporary taking claim:

- The Government repeatedly promised downstream property owners that it would keep the floodgates closed. App. Br. at 5-6.
- During Tropical Storm Harvey, the Government could have kept the floodgates closed; the Reservoirs were not structurally compromised or in danger of failing. App. Br. at 9.
- The Government intentionally chose to open the floodgates pursuant to Section 7-05(b) of the Manual, even though it did not have to do so to avoid imminent failure of the Reservoirs. App. Br. at 9-10.
- The Government knew that opening the floodgates would flood the downstream property owners. App. Br. at 8-10.

These facts, taken as true, are sufficient to defeat virtually all the arguments set forth in the Government's brief.

The Government argues that Appellants have no right to focus their claim on the decision to open the floodgates, insisting that the temporary taking analysis must encompass the full history of government conduct regarding the Reservoirs. Govt Br. at 45-46. But it offers scant support for that assertion. The Government stakes its case on *Cary v. United States*, 552 F.3d 1373 (Fed. Cir. 2009). But *Cary* was completely different.

Cary involved a claim by property owners whose residences were destroyed by a massive fire that erupted when "a deer hunter lost in the forest lit a signal fire to aid his rescue." *Id*. at 1375. There was no claim that the Government lit the fire or failed to control the fire after it was lit. Rather, the plaintiffs complained that nearly a century of forest management policies dedicated to fire suppression had made the area dangerously susceptible to the risk of a "devastating firestorm." *Id*. "They accused the Forest Service of taking the known calculated risk that its land management policies in the [region] would result in a taking of adjacent landowners' property in the event of a fire originating in the [region] that spread outside its boundaries." *Id*.

This Court was justifiably skeptical that these facts could establish a taking. "Clearly," it noted, "the government did not intend to take the landowners' land by use of an uncontrolled wildfire, and they do not allege that it did." *Id*. at 1377. Instead, the plaintiffs said their losses were "the direct, natural, or probable result" of a longstanding government policy. *Id*.

> Their complaint alleges that the government created a risk that wildfires would spread to neighboring properties through its policies.… They similarly pleaded that the government took the calculated risk that a recreational user would start a fire, would do so during the extreme fire conditions of October 2003, and that the fire would likely become a wildfire resulting in the taking of property adjacent to the forest.

Id.

Taken at face value, therefore, the government action challenged in *Cary* was not a specific government decision, but decades of forest management policy. Faced with that claim, this Court correctly noted that "[t]he 'policy' is not one authorized action but a set of intertwined, authorized actions." *Id*. at 1377 n.*. Having made such a claim, the property owners were not free to "cherry-pick parts of the Forest Service policy which they argue have increased the risk of wildfire since 1911 without acknowledging that much of the Forest Service policy over the last century has been devoted to reducing the risk of wildfire by controlling the same fuel loads the landowners allege have been allowed to accumulate." *Id*.

At most, therefore, *Cary* stands for the proposition that a plaintiff may not "cherry-pick parts" of a comprehensive policy that is alleged to constitute a taking. It does *not* stand for the proposition that, in a case about "one authorized action," *id*., the Government can broaden the scope of the government action in question. This case focuses on "one authorized action": the decision to open the floodgates. *Cary* does not permit the Government to recast that claim to focus on other actions. *See* App. Br. at 50-55 (explaining this distinction).

Furthermore, the holding in *Cary* did not turn on the Court's comment about the scope of the government policy, but on its conclusion that the plaintiffs could not establish either foreseeability or causation (and thus could not bridge the gap from a tort to a taking). *See Cary*, 552 F.3d at 1378-79.

With respect to causation, this Court held that "an actual ignition, not a risk, is what set the wildfire in the [region]. The hunter setting the fire was an intervening cause which broke any perceived chain of causation...." *Id*. at 1378-79. Seizing on that language, the Government argues here that Tropical Storm Harvey "was an intervening cause that broke the chain of causation." Govt Br. at 48. However, the storm hit *before* the Government opened the floodgates—not *after*—so it was not an "intervening cause." Restatement (Second) of Torts § 441(1).

Importantly, *Cary* emphasized that the proper causation analysis depends on the government action in question; if a different government action had occurred, causation might have been established. *Cary*, 552 F.3d at 1379. "Wherever there is an authorized action," this Court explained, "the causation prong is satisfied for any injury which is the direct, natural, and probable result *of that action*." *Id*. (emphasis added).

In the end, therefore, *Cary* does not support the Government's assertion that it is entitled to recharacterize the government action in question for its own benefit. On the contrary, *Cary* illustrates that a temporary taking claim must be evaluated based on the government action being challenged—and such a claim is cognizable if the Government invaded private property through an "individual decision" and "no break in the chain of causation existed between the suspected government authorized action and the injury." *Id*. at 1379-80. This is such a case.

2. The government-induced flooding of Appellants' properties satisfied the intent prong of the *Arkansas Game* test.

The Government contends the flooding of Appellants' properties was neither "intentional" nor a "direct, natural, or probable result" of any government action, so it was a tort rather than a taking. Govt Br at 42-49. It is mistaken.

As noted above, the Government made a decision to open the floodgates and flood downstream properties; it did so with full knowledge of the consequences for downstream property owners. *See* p. 15, *supra*. This is not a case like *Ridge Line*, where a construction project had the incidental and unintended consequence of changing drainage patterns and flooding nearby properties. This is a case in which government decisionmakers made a conscious decision to flood specific properties. It is implausible for the Government to pretend this flooding was not "intentional," or even a "direct, natural, or probable result" of its decision to open the floodgates. Based on this record, there was nothing "accidental," Govt Br. at 42, "incidental," *id*. at 42-43, "attenuated," *id*. at 43, or "remote," *id*., about the wave of water that flowed downstream when the Government opened the floodgates. On the contrary, the Government's brief admits "it was foreseeable at the moment the Corps made the surcharge releases that downstream properties would be flooded." *Id*. at 44. Nothing more is required to prove foreseeability. *Arkansas Game*, 568 U.S. at 39. Notably, the Government has cited no case in which a deliberate decision to flood private property was held to be a tort rather than a taking.

Likewise, this case is not about "'apprehension of flooding.'" Govt Br. at 49 (quoting *Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750 (Fed. Cir. 2013)). It is a case in which the Government opened its floodgates with knowledge of the consequences for downstream property owners; the flood that resulted was not just "conceivable" but "actually expected." *Id*. That is a taking—not a tort.

The Government tries to avoid this result by insisting that the flooding was a "direct, natural, or probable result" of Tropical Storm Harvey—not of its decision to open the floodgates. Govt Br. at 42-45. But this argument crashes into the facts, as the Reservoirs remained structurally intact and were never in danger of failing. App. Br. at 9. This is not a case where it was impossible to prevent the flooding or where failure of the Reservoirs was imminent, creating an emergency situation. *Id*. The induced surcharges were ordinary operations taken as precautionary measures. *Id*. at 10. The storm itself did *not* cause the downstream flooding. *Id*. at 9-10. Notably, none of the cases cited by the Government involved a situation in which floodwaters were controlled and no emergency existed but the Government elected to open floodgates and inundate private property.

The line between a tort and a taking is crossed when flooding is "intended" or is "the foreseeable result of authorized government action." *Arkansas Game*, 568 U.S. at 39. Those facts are established as a matter of law by this record. Thus, this intentional flooding event was a taking—not a tort.

3. A single flooding event can constitute a taking under the *Arkansas Game* test.

The Government argues that because this case involves "a singular event," Govt Br at 50, rather than recurrent flooding, there can be no taking. *Id*. at 50-54. Appellants anticipated this argument, App. Br. at 49-50, which is incorrect.

In *Arkansas Game*, the Supreme Court held "government-induced flooding of limited duration may be compensable. No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case." *Arkansas Game*, 568 U.S. at 34. The Court specifically stated that temporary flooding cases cannot be decided by "blanket exclusionary rules." *Id*. at 37. Timing considerations are just "a factor," *id*. at 38, not a basis for an "automatic exemption from Takings Clause inspection." *Id*. *Arkansas Game* announced a multi-factor balancing test. *Id*. at 38-39.

The Government's proposed bright-line rule contradicts this balancing test. As Appellants' opening brief noted, the CFC rejected this very argument in another flooding case. *See Quebedeaux v. United States*, 112 Fed. Cl. 317, 323-25 (2013). The Government's brief simply pretends that *Quebedeaux* does not exist. Instead, it cites an extended line of temporary flooding cases that predated *Arkansas Game*. Govt Br. at 50-54. This is just an invitation to repeat the error.

The Government invokes this Court's opinion on remand in *Arkansas Game*, Govt Br. at 53-54, but it reads too much into this Court's ruling. This Court made clear that its prior ruling applying an "inevitably recurring" test had been reversed, and its resolution of the fact-specific recurrence issue in that case had nothing to do with the facts of this case. *See Arkansas Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1369-70 (Fed. Cir. 2013). The Court was careful to acknowledge that the Supreme Court commands a fact-specific balancing test in flooding cases, and it conducted such an analysis. *Id*. at 1370-75. It should do the same here.

Finally, the Government deceptively cites *Cedar Point* as support for the proposition that "isolated invasions" are individual torts as opposed to takings. Govt Br. at 50. But as explained above, the Supreme Court limited that remark to isolated invasions that were "not undertaken pursuant to a granted right of access." *Cedar Point*, 141 S. Ct. at 2078. This line separates a trespass from a taking. *Id*. The Government acted "pursuant to a granted right of access," *id*., when it chose "to invoke the Manual's surcharge-release procedures." Govt Br. at 51. As such, this case does not involve a mere "isolated invasion" or a "situational response," *id*. at 50-51, along the lines of the invasions in the cases cited by the Government. It involves a deliberate property invasion pursuant to a formal policy that remains on the books today. App. Br. at 7-10, 15. The Government cites no case holding that a single flood is not a taking under comparable facts.

III. The *St. Bernard Parish* analysis of causation is inapplicable to this case.

A. *St. Bernard Parish* does not apply to intentional inundation cases.

The Government relies heavily on *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354 (Fed. Cir. 2018). Govt Br. at 32-39. But that reliance is misplaced. The Government itself has stated that *St. Bernard Parish* is different from a case, like this one, in which the Government conducts a "'deliberate release of waters'" as part of its "'authorized operations.'" App. Br. at 54 (citation omitted).

Why did the Government propose such a distinction in *St. Bernard Parish*? Because the whole point of the causation analysis set forth in *St. Bernard Parish* and similar cases is to distinguish torts from takings in temporary flooding cases—giving effect to "the traditional trespass-versus-takings distinction." *Cedar Point*, 141 S. Ct. at 2079. This whole body of law deals with the line-drawing problem of distinguishing government actions that cause accidental, unintended flooding (which are merely torts) from those that cause such direct flooding consequences that the invasion of private property is properly viewed as a necessary feature of the government project (which are takings). *See*, *e.g.*, *Sanguinetti v. United States*, 264 U.S. 146, 149-50 (1924); *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355-57 (Fed. Cir. 2003). There is no need for such a line-drawing inquiry when the Government deliberately floods private property.

Thus, in *St. Bernard Parish*, this Court cited a series of cases in which courts undertook a causation analysis to determine whether construction of a particular flood control project had the net effect of "taking" property from a property owner. This analysis applied to a dike (*Archer*), a canal (*Sanguinetti*), a levee (*Danforth*), a dam (*Accardi*), a floodway (*Sponenbarger*), and a system of channels and levees (*St. Bernard Parish*). *See St. Bernard Parish*, 887 F.3d at 1362-64. In such cases, Appellants agree that the question is "whether the whole of the government action caused the plaintiff's injury." *Id.* at 1364. As *Cary* logically held, *see* pp. 16-18, when the government action in question is comprised of a series of related actions, "the causation analysis must consider both risk-increasing and risk-decreasing government actions over a period of time to determine whether the totality of the government's actions caused the injury." *Id*. at 1365. But this is not such a case. When the Government decides to flood private property in one authorized action, causation is self-evident. *St. Bernard Parish* is inapplicable to such a case.[1]

Here, Appellants do not complain about the construction of the Reservoirs (which occurred decades ago). They challenge the decision to open the floodgates, so the causation inquiry is whether the downstream properties would have flooded "if the government had not acted" by opening the gates. *Id*. at 1362.

[1] The opinion on remand in *Arkansas Game* is not to the contrary, as those parties did not clash over the proper causation framework—presumably because altering the baseline for comparison "appears to have had no effect on the outcome." *Arkansas Game*, 736 F.3d at 1372 n.2; *see also St. Bernard Parish*, 887 F.3d at 1365 n.11.

B. If necessary, the *Hardwicke* exception applies to this case.

Even if the causation analysis in a case involving a single authorized action must take account of "the *entirety* of the government action related to flood risk," Govt Br. at 34, *St. Bernard Parish* recognized an exception for cases like this one:

> [I]f the risk-reducing government action preceded the risk-increasing action, the risk-reducing action would only be considered in assessing causation if the risk-increasing action was 'contemplated' at the time of the risk-reducing action.

Id. at 1367 n.14 (discussing *John B. Hardwicke Co. v. United States*, 467 F.2d 488 (Ct. Cl. 1972)). This theory was sustained in *Ideker Farms, Inc. v. United States*, 142 Fed. Cl. 222 (2019), *appeal docketed*, No. 21-1849 (Fed Cir. Apr. 14, 2021). If it is necessary to reach the issue, Appellants' takings claim fits squarely within the *Hardwicke* exception.

To begin, the Government attempts to minimize *Hardwicke* by arguing that the exception is dicta and was not adopted by *St. Bernard Parish*. Govt Br. at 37. But *Hardwicke*'s analysis is persuasive. In that case, an upstream plaintiff brought a takings claim after the government closed the gates of the Anzalduas Dam and inundated its property. 467 F.2d at 488. The Anzalduas Dam was a diversion dam downstream from the plaintiff that was contemplated by certain treaty obligations. *Id.* at 488-89. Under the same treaty obligations, the government had also built the Falcon Dam, which was a storage dam upstream from the plaintiff. *Id.* at 489.

The Falcon dam was built first. It reduced flooding on the plaintiff's land and increased its value. *Id.* The Anzalduas Dam was built second and slightly increased flooding—but "the expectation of flooding was still far less than it would have been if there had been no flood control program at all." *Id.* at 489-90. Thus, the net effect on the plaintiff's property rights was favorable. *Id*.

The court applied the *Miller* doctrine—under which governments need not compensate landowners for value created by a project that takes private property—to the related question "whether property is taken at all." *Id.* at 490. Finding that "[t]here was no time" when property owners "could have reasonably supposed" that they would benefit from the first dam without the burdens of the second dam, the court held there was no taking. *Id.* at 491. As *St. Bernard Parish* recognized, this analysis suggested that the result would be different if the risk-reducing action had occurred prior to the risk-increasing action, resetting the causation "baseline." *St. Bernard Parish*, 887 F.3d at 1367 n.14. This is such a case.

The *Hardwicke* exception recognizes that property owners have legitimate "investment-backed expectations" in property protected by flood control projects. *See Arkansas Game*, 568 U.S. at 39. Owners cannot ignore facts that are apparent, but by the same token, if the government acts in ways that are not contemplated, but-for causation analysis should compare the challenged government action to a "baseline" that represents the owners' investment-backed expectations.

Next, the Government argues that the *Hardwicke* exception does not apply "even on its own terms" because there is only one project involved here, not two. Govt Br. at 37. Yet again, this focus is misplaced because the government action in question is not the construction of the Reservoirs, but opening the floodgates. Because the risk-reducing action (construction of the Reservoirs) occurred *decades* before the risk-increasing action, the *Hardwicke* rationale is even more compelling. The *St. Bernard Parish* causation analysis makes no sense in such a case.

Last, the Government argues that even if the *Hardwicke* exception applies, the risk-increasing activity (opening the floodgates) was "contemplated" when the risk-reducing activity (installing the floodgates) took place. Govt Br. at 37-39. According to the Government, the Corps has contemplated opening the floodgates since the 1962 Water Control Manual. *Id.*

But under *Hardwicke*, the question is whether the *plaintiffs* knew or should have known about the risk-increasing activity. None of the test property owners knew about the Water Control Manual or Section 7-05(b). App. Br. at 7. Rather, the Corps repeatedly and publicly pledged to operate the Reservoirs in a manner to prevent downstream flooding—even at the cost of flooding upstream properties. App. Br. at 5-6; Appx4341-4342 ("We will not open the dam to a point where it will cause flooding downstream."). Thus, when the evidence is viewed in the light most favorable to Appellants, this case satisfies the *Hardwicke* exception.

C. Opening the floodgates caused the flooding.

The Government argues that if the Reservoirs had not been constructed and operated as they were during Tropical Storm Harvey, the downstream properties would have experienced greater flooding. Govt Br. at 34. That is beside the point. The causation question is what would have happened if the Government had not opened the floodgates—the government action in question. In that but-for world, the downstream properties would have experienced little or no flooding.

Experts on both sides of this litigation have compared what happened during Tropical Storm Harvey against what would have happened if the floodgates had remained closed. Their conclusions are similar: If the gates had remained closed, several downstream test property owners would not have flooded at all and the rest would have experienced lesser flooding. *Compare* Appx2315 *with* Appx2726; Appx2828-2830; Appx2786; Appx2804-2811.

Unable to deny this evidence, the Government points to expert testimony that leaving the floodgates closed would have caused greater flooding *upstream*. Govt Br. at 34-35. Even if true, this fact does not undercut the causation analysis for the *downstream* plaintiffs. Indeed, it only confirms that a taking has occurred; the downstream plaintiffs were forced to bear the societal cost of a decision made for the greater good. Appellants should not bear that cost alone.

In substance, the Government's causation argument is really a covert attempt to smuggle in a "relative benefits" defense. But as this Court recently explained, that doctrine "does not compare the benefits conferred on the community at large." *Alford v. United States*, 961 F.3d 1380, 1384-85 (Fed. Cir. 2020). The defense is not viable here.

Similarly, the Government argues that keeping the gates closed "could have compromised the structural integrity of the dams." Govt Br. at 34-35. However, viewed in the light most favorable to Appellants, the record establishes that the Reservoirs were never structurally compromised or at risk of failure. App. Br. at 9. The Government's choice to flood downstream properties as a precaution confirms that a taking has occurred.

Finally, the Government argues that government *inaction* cannot form the basis of a takings claim. Govt Br. at 39. But Appellants neither pled nor attempted to prove a takings claim based on government *inaction*. Rather, they pointed to a specific government action (opening the gates) that caused downstream flooding. This is a case of "one authorized action" that took private property.

CONCLUSION

Appellants renew their prayer for relief in the Brief of Appellants.

Respectfully submitted,

BECK REDDEN LLP

By: /s/ *Russell S. Post*
Russell S. Post
David M. Gunn
Parth S. Gejji
1221 McKinney, Suite 4500
Houston, TX 77010
(713) 951-3700
(713) 951-3720 (Fax)

FLEMING, NOLEN & JEZ, LLP
Rand P. Nolen
2800 Post Oak Blvd., Suite 4000
Houston, TX 77056
(713) 621-7944
(713) 621-9638 (Fax)

ATTORNEYS FOR APPELLANTS IN 128 APPEALS

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2021, a copy of the foregoing brief was filed electronically with the Clerk of the Court using the Court's ECF System. Notice of this filing will be sent electronically by operation of the Court's electronic filing system to all counsel of record as follows:

Brian C. Toth
Attorney, Appellate Section
Env't and Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, DC 20044

Attorneys for Appellee United States

/s/ *Russell S. Post*
Russell S. Post

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. Cir. R. 32(b)(1) because it contains 7000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

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Dated: August 24, 2021.

/s/ *Russell S. Post*
Russell S. Post
Attorney of Record for Appellants