Nos. 2021-1131, -1132, -1133, -1134, -1135, -1136, -1137, -1138, -1139, -1140, -1142, -1143, -1144, -1145, -1146, -1147, -1148, -1151, -1152, -1155, -1157, -1159, -1161, -1162, -1163, -1164, -1165, -1167, -1171, -1172, -1173, -1174, -1175, -1176, -1177, -1178, -1184, -1186, -1187, -1188, -1189, -1190, -1192, -1193, -1195, -1196, -1197, -1198, -1199, -1200, -1201, -1204, -1205, -1206, -1207, -1208, -1214, -1215, -1216, -1217, -1218, -1220, -1221, -1222, -1223, -1224, -1225, -1230, -1231, -1232, -1233, -1234, -1237, -1238, -1239, -1240, -1241, -1242, -1243, -1244, -1250, -1251, -1252, -1253, -1254, -1255, -1256, -1268, -1269, -1270, -1271, -1272, -1273, -1274, -1275, -1276, -1277, -1279, -1280, -1281, -1282, -1283, -1284, -1285, -1286, -1287, -1288, -1289, -1290, -1291, -1293, -1294, -1295, -1296, -1302, -1303, -1304, -1305, -1306, -1307, -1308, -1309, -1310, -1311, -1312, -1313, -1314, -1315, -1316, -1317, -1318, -1319, -1320, -1322, -1324, -1325, -1335, -1336, -1337, -1338, -1339, -1341, -1394, -1398, -1403, -1404, -1405, -1406, -1407, -1427, -1429, -1431, -1444, -1455, -1464, -1465, -1467, -1468, -1472, -1479, -1481, -1482, -1483, -1492, -1494, -1499, -1513, -1529, -1539, -1540, -1541, -1847, -1889, -1890, -1891, -1894, -1947, -2047

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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

On Appeal From the United States Court of Federal Claims Sub-Master Docket No. 17-9002L & Case Nos. 1:18-CV-708; 1:18-CV-1652L; 1:19-CV-588; 1:18-CV-707; 1-17-CV-1191LAS,
and all others connected with the consolidated appeals

CORRECTED REPLY BRIEF OF PLAINTIFFS-APPELLANTS IN CONSOLIDATED CASE NOS. 21-1492, 21-1494, 21-1499, 21-1513, & 21-1529

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENTS & AUTHORITIES 2

I. The Government's arguments rest on a flawed analysis of Texas cases. 2

A. The case law cited by the Government to support its police power argument have no relevance to the case at hand. 4

B. The cases cited by the Government to support its controlled release after unprecedented rainfall argument are not dispositive. 7

C. The Government's argument that it has no liability in failing to act against Acts of God are inapplicable here. 9

D. The Government argument that property interests are limited by the owners' expectations as of the date they acquired the property fails. 11

II. The Government's analysis of Federal law rests on inapplicable statutes and case law. 12

A. The Flood Control Act ("FCA") does not apply here. 13

B. The Government's argument regarding the Corps' police power lacks merit. 16

III. The Government's "alternative grounds" upon which the CFC's order should purportedly be upheld lack merit. 20

A. The Corps was the cause-in-fact of the flooding on Appellants' properties. 20

B. The flooding that resulted from the Corps' controlled releases, though temporary, amounts to a Taking. 23

1. Appellants satisfy the first *Ridge Line* element. 25

2. Appellants satisfy the second *Ridge Line* element. 32

C. The Court can properly reverse and render judgment in favor of Appellants. 35

CONCLUSION 36

CERTIFICATE OF SERVICE 37

CERTIFICATE OF COMPLIANCE WITH RULES 27(D)(2)(A), 32(A)(5) AND 32(A)(6) 38

TABLE OF AUTHORITIES

Cases:

Alford v. United States,
961 F.3d 1380 (Fed. Cir. 2020)..21
Ark. Game & Fish Comm'n v. United States (Arkansas Game & Fish II),
736 F.3d 1364 (Fed. Cir. 2013)..7, 30, 33
Ark. Game & Fish Comm'n v. United States,
568 U.S. 23 (2012) .... *passim*
Bachmann v. United States,
134 Fed. Cl. 694 (2017) 18
Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991) 18
Bartz v. United States,
633 F.2d 571 (Ct. Cl. 1980) 31
Bedford v. United States,
192 U.S. 217 (1904) 28, 29
Benavides v. Gonzalez,
396 S.W.2d 512 (Tex. App.—San Antonio 1965, no writ).............10
Bennis v. Michigan,
516 U.S. 442 (1996) 17
Bowditch v. Boston,
101 U.S. 16 (1880) 16
Bridge Co. v. United States,
260 U.S. 125 (1922) 27
Cary v. United States,
552 F.3d 1373 (Fed. Cir. 2009)...32
Cedar Point Nursery v. Hassid,
141 S. Ct. 2063 (2021) 33
Central Green Co. v. United States,
531 U.S. 425 (2001) 13
Chicago Burlington & Quincy Railway Co. v. Ill.,
200 U.S. 561 (1906) 18

City of Dallas v. Stewart,
361 S.W.3d 562 (Tex. 2012)....4
City of Dallas v. Winans,
262 S.W.2d 256 (Tex. Civ. App.—Dallas 1953, no writ)....11
City of Tyler v. Likes,
962 S.W.2d 489 (Tex. 1997)....11
Columbia Basin Orchard v. United States,
132 F. Supp. 707 (Ct. Cl. 1955)....30
Cummins v. Travis Cty. Water Control & Improvement Dist. No. 17,
175 S.W.3d 34 (Tex. App.—Austin 2005, pet. denied)....4
Harris Cnty. Flood Control Dist. v. Kerr,
499 S.W.3d 793 (Tex. 2016)....11
Hurtado v. United States,
410 U.S. 578 (1973)....17
Ideker Farms, Inc. v. United States,
136 Fed. Cl. 654 (2018)....13
Jackson v. United States,
230 U.S. 1 (1913)....29
John B. Hardwicke Co. v. United States,
467 F.2d 488 (Ct. Cl. 1972)....32
Kopplow Dev., Inc. v. City of San Antonio,
399 S.W.3d 532 (Tex. 2013)....8
Lambert v. California,
355 U.S. 225 (1957)....18
Landgraf v. Nat. Res. Conservation Serv.,
No. 6:18-cv-0061, 2019 WL 1540643 (S.D. Tex. Apr. 9, 2019)....11
Lech v. Jackson,
791 Fed. Appx. 711 (10th Cir. 2019)....17
Lombardo v. City of Dallas,
73 S.W.2d 475 (Tex. 1934)....6
Luther Transfer & Storage, Inc. v. Walton,
296 S.W.2d 750 (Tex. 1956)....10

Miller v. Shoene,
276 U.S. 272 (1928) 18

Monongahela Bridge Co. v. United States,
216 U.S. 177 (1910) 18

Motl v. Boyd,
286 S.W. 458 (Tex. 1926) 4

Mugler v. Kansas,
123 U.S. 623 (1887) 18

Nat'l Board of YMCA v. United States,
395 U.S. 85 (1969) 17

Nat'l Mfg. Co. v. United States,
210 F.2d 263 (8th Cir. 1954) 14

Pumpelly v. Green Bay & Miss. Canal Co.,
80 U.S. 166 (1871) 7

Ridge Line, Inc. v. United States,
346 F.3d 1346 (Fed. Cir. 2003) 25, 32

Sabine River Auth. v. Hughes,
92 S.W.3d 640 (Tex. App.—Beaumont 2002, pet. denied) 7

San Jacinto River Authority v. Bolt,
No. 01-18-00823-cv, 2019 WL 2458987 (Tex. App.—Houston [1st Dist.] June 13, 2019, pet. filed) 9

San Jacinto River Authority v. Burney,
570 S.W.3d 820 (Tex. App.—Houston [1st Dist.] 2018), *aff'd sub nom*, *San Jacinto River Authority v. Medina*, -- S.W.3d --, 2021 WL 1432227 (Tex. 2021) 8

Sanguinetti v. United States,
264 U.S. 146 (1924) 30

Severance v. Patterson,
370 S.W.3d 705, 710 (Tex. 2012) 5

Sponenbarger v. United States,
308 U.S. 256 (1939) 14

St. Bernard Parish Government v. United States,
887 F.3d 1354 (Fed. Cir. 2018) 20, 21, 31

Tarrant Reg'l Water Dist. v. Gragg,
151 S.W.3d 546 (Tex. 2004)..8, 21
United States v. Archer,
241 U.S. 119 (1916) 21
United States v. James,
478 U.S. 597 (1986) 13
Waller v. Sabine River Auth. of Tex.,
No. 09-18-00040-cv, 2018 WL 6378510 (Tex. App.—Beaumont Dec. 6, 2018, no pet.) 8
Wickham v. San Jacinto River Auth,
979 S.W.2d 876 (Tex. App.—Beaumont 1998, pet. denied)............7
Wilfong v. United States,
480 F.2d 1326 (Ct. Cl. 1973) 30

Statutes:

33 U.S.C. § 702c..13

INTRODUCTION

In its response, the Government makes an important concession: it had a *choice* in whether it released the dams that flooded the downstream properties. (Gov.Brief.31). Much like the "trolley problem" introduced in Appellants' Brief, the Government was presented with a *choice*: open the dams and conduct controlled releases, knowing it would flood downstream properties, or not. (App.Brief.14).[1] The question is whether the Government is constitutionally responsible for the damage that resulted from the affirmative act, its *choice*, of opening the dams. The answer has always been yes, but the Government's Brief confirms that answer.

The Government's Brief also ignores the arguments made in the Appellants' Brief, instead focusing on an inaccurate application of Texas and federal law regarding the property interest at issue and causation standard. The Government's positions, beyond wrong, are championed by nonsensical arguments regarding causation and the property interest at issue, tenuously related case law, and outright ignoring flowage

[1] Parenthetical citations to "App.Brief.#" refer to Document No. 49, Corrected Opening Brief of Appellants. References to "Appellants' Brief" herein refer to same.

easement jurisprudence. Moreover, the Government's positions rest on a misconstruction of the facts in the record, which are addressed herein. Ultimately, the Government cannot escape the simple fact that the result of its *choice* was either known or reasonably certain; namely, the intentional flooding of downstream properties for which it had no flowage easement.

For the reasons set forth below, and those set forth in Appellants' Brief, this Court should reverse the Court of Federal Claims' ("CFC") decision, and render judgment in favor of Appellants; alternatively, this Court should reverse the CFC's decision and remand this case for further proceedings.

ARGUMENTS & AUTHORITIES

The Government's arguments rest on analyses of cases and statutes that are inapplicable to the case at hand and ignore the relevant Government actions. The CFC's decision below should be reversed.

I. The Government's arguments rest on a flawed analysis of Texas cases.

The Government's arguments rest on a flawed Takings analysis, first analyzing the property interest as "avoiding flooding on their properties from an unprecedented storm," which ignores both the

property interested asserted—a flowage easement—and the Government's intentional release of the dams. (Gov.Brief.18).

Appellants do not argue for an interest in maximum protection or perfect flood control. (App.Brief.27–29). Instead, in the court below, Appellants asserted that the Government permanently and temporarily took a flowage easement—a recognized property interest—where it had none. (App.Brief.48–54). Largely ignoring the arguments of counsel made in its brief, the Government argues that "even if the Corps' actions in operating the Project" was construed as a contributing cause of the flooding of Appellants' properties, "emergency flood control" is within the Government's traditional police powers. (Gov.Brief.18). The Government then argues "[t]hat the Corps might have operated the reservoirs in a manner to afford downstream owners greater flood protection . . . does not provide the downstream owners a cognizable property right to such maximum protection." (*Id.*,19). The Government's police power argument does not foreclose Appellants' suit, as constitutional requirements cannot be circumvented by the Government's ex post facto declaration of intentional flooding in the guise of police powers. (App.Brief.59).

A. The case law cited by the Government to support its police power argument have no relevance to the case at hand.

The Government then attempts to support its conclusion that there is no property interest in maximum flood protection, citing state law for the proposition that "all property is held subject to the valid exercise of the police power." (Gov.Brief,19). The cases the Government cites in support of this proposition are inapplicable, as the facts are far from that of the present case and provide no support here. *City of Dallas v. Stewart*, 361 S.W.3d 562 (Tex. 2012) (inverse condemnation suit after administrative proceedings declared house nuisance; dismissed argument that attempted to draw comparison to federal case); *Motl v. Boyd*, 286 S.W. 458 (Tex. 1926) (riverfront property owner does not own the surging waters; no limitation of owner's rights in the land); *Cummins v. Travis Cty. Water Control & Improvement Dist. No. 17*, 175 S.W.3d 34 (Tex. App.—Austin 2005, pet. denied) (no littoral rights in lakefront property; chain of title was not granted from the state).

The Government cites *Patterson*, stating it counts "the government's police power as among the 'pre-existing limitations' on real property ownership 'since time immemorial.'" (Gov.Brief.19). The

Government's statement regarding *Patterson*, a case addressing whether private beachfront properties were impressed with public rights of use without proof of an easement, conveniently ignores what it actually stated:

> Limitations on property rights may be by consent of the owner, ***state condemnation with payment of just compensation***, appropriate government action under its police power (such as addressing nuisances), sufficient proof of use by persons other than the owner that creates an estoppel-based right to continuing use (easements) or pre-existing limitations in the rights of real property owners that have existed 'since time immemorial,'

Severance v. Patterson, 370 S.W.3d 705, 710 (Tex. 2012) (emphasis added). There is neither a nuisance to be addressed with police power nor a history of releasing the dams at any rate that would flood contiguous properties that would create any prescriptive easement. Absent the foregoing, Texas law establishes that condemnation of property can occur only with payment of just compensation, which is the suit Appellants pursue here. (App.Brief.33–43). The Government's limited reading of *Patterson*, ignoring relevant language, does not support its position.

The Government cites *Lombardo v. City of Dallas*; though the case states "[a]ll property is subject to the valid exercise of police power," it

also sets forth clear restraints on exercises of police power, which arise primarily in the context of unlawful uses or nuisance created by the property owner, a fact conveniently ignored by the Government:

> ***the police power is subordinate to the right to acquire and own property***, and to deal with it and use it as the owner chooses, so long as the use harms nobody. It may be invoked to abridge the right of the citizen to use his private property ***when such use*** will endanger public health, safety, comfort or welfare,-and ***only*** when this situation arises.

Lombardo v. City of Dallas, 73 S.W.2d 475, 479 (Tex. 1934) (emphasis added).

The Government would have this Court hold that constitutionally guaranteed rights are subordinate to the exercise of police power. However, the exercise of police power is not preeminent absent unlawful use or nuisance created by the property owner and is indeed subject to property ownership. The cases the Government attempts to rely on do not support its position or have any relevance here.

Instead, when the Government physically takes possession of an interest in property for a public purpose, it has a "categorical duty to compensate the former owner," and even a temporary taking short in duration can be compensable. *Ark. Game & Fish Comm'n v. United*

States, 568 U.S. 23, 31 (2012); *Ark. Game & Fish Comm'n v. United States (Arkansas Game & Fish II)*, 736 F.3d 1364, 1369 (Fed. Cir. 2013). These constitutional requirements cannot be circumvented by the Government's ex post facto declaration of exercise of police powers. *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177–78 (1871).

B. The cases cited by the Government to support its controlled release after unprecedented rainfall argument are not dispositive.

The Government alleges that Texas courts have "repeatedly rejected claims for takings from the controlled release of water from reservoirs in response to unprecedented rainfall." (Gov.Brief.20). The cases the Government cites do not support its position, nor are they binding precedent in Houston. (App.Brief, 41). *Wickham v. San Jacinto River Auth*, 979 S.W.2d 876, 884 (Tex. App.—Beaumont 1998, pet. denied) (water released from dams was flowing into river and mixing with other tributaries before overflowing its banks and flooding plaintiffs' homes; neither the lake nor its dam, from which water was released, were designed to function as a flood control facility); *Sabine River Auth. v. Hughes*, 92 S.W.3d 640, 642 (Tex. App.—Beaumont 2002, pet. denied) (reservoir output first flowed into river through man-made channels and

then mixed with water in bayou before running into the river and overflowing, causing flooding); *Waller v. Sabine River Auth. of Tex.*, No. 09-18-00040-cv, 2018 WL 6378510, at *8 (Tex. App.—Beaumont Dec. 6, 2018, no pet.) (dam not designed as a flood control dam; distinguished *Ark. Game & Fish*, 568 U.S. at 23).

Instead, there are ample applicable Texas cases that support Appellants' position. *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex. 2004);[2] *Kopplow Dev., Inc. v. City of San Antonio*, 399 S.W.3d 532 (Tex. 2013); *San Jacinto River Authority v. Burney*, 570 S.W.3d 820 (Tex. App.—Houston [1st Dist.] 2018), *aff'd sub nom*, *San Jacinto River Authority v. Medina*, -- S.W.3d --, 2021 WL 1432227 (Tex. 2021);[3] *San*

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[2] The Government did not address Appellants' arguments regarding *Gragg*'s applicability in their Brief, and where *Gragg* was briefly referenced in its response, it is only noted as "cited in Beck Redden Brief," entirely ignoring these Appellants' arguments.

[3] The Government alleges *Medina*, issued after opening briefs were filed, is not dispositive because the decision did not consider the merits of the Takings claim or the property interests asserted. (Gov.Brief.23, n. 2). This is because the Authority in *Medina* appealed only the trial court's denial of the motion to dismiss as to the statutory takings claims, since the *Burney* court vacated the dismissal of the plaintiffs' inverse condemnation claims, finding the trial court lacked jurisdiction, as civil county courts at law had exclusive jurisdiction of the claims. *Burney*, 570 S.W.3d at 838; *Medina*, 2021 WL 1432227. However, Appellants cited *Burney* in the trial court below, as showing Texas' recognition of flowage easements. Appx2908.

Jacinto River Authority v. Bolt, No. 01-18-00823-cv, 2019 WL 2458987 (Tex. App.—Houston [1st Dist.] June 13, 2019, pet. filed).

The Government attempts to foreclose its Takings liability by arguing outflow from the dams was far less than inflow. (Gov.Brief.20). However, that is not the entirety of the inquiry. *Wickham* and *Hughes* both note that the outflow was less than inflow, however, both also note that the water released from the dams mixed with other water before overflowing and flooding the plaintiffs' properties. As stated in *Arkansas Game & Fish*, and reiterated in *Waller*, Takings claims turn on the specific facts that led to the flood. 568 U.S. at 34, 37. The specific facts that are relevant here involve the Government's intentional and knowing release of federal water, as are set forth at length in Appellants' Brief. (App.Brief.1–24). The CFC's decision should be reversed.

C. The Government's argument that it has no liability in failing to act against Acts of God are inapplicable here.

The Government alleges that Texas courts have rejected a theory that a government's failure to safeguard property against Acts of God gives rise to property damage claims and governments cannot be expected to insure against every misfortune occurring within their geographic boundaries on the theory that it could have done more.

(Gov.Brief.20–21). Simply, Appellants do not seek to hold the Government responsible on the theory that it could have done more. Instead, Appellants seek to hold the Government responsible for the affirmative act it took by releasing the dams. (App.Brief, *passim*).

Moreover, the act of the Corps releasing the dams was no act of God, instead it was an intentional, authorized act of the Government. The cases the Government cites in support of its Act of God arguments are not dispositive. (Gov.Brief.21 (citing *Luther Transfer & Storage, Inc. v. Walton*, 296 S.W.2d 750 (Tex. 1956) (negligence case between private parties after flood damaged items stored in warehouse; no affirmative act by other party alleged); *Benavides v. Gonzalez*, 396 S.W.2d 512 (Tex. App.—San Antonio 1965, no writ) (case between adjoining landowners following reservoir overflow after unprecedented rainfall; no affirmative act alleged); *Waller*, 2018 WL 6378510, at * 5) (distinguishing *Arkansas Game & Fish*, *inter alia*, because it did not indicate whether a hydroelectric power plan subject to FERC regulations was involved)).

Then, the Government argues that the Corps was operating the dams "to control flooding in the face of the extraordinary volume of rainfall from Hurricane Harvey, an 'Act of God' under Texas law."

(Gov.Brief.21). The cases cited by the Government do not support that position. *Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 795 (Tex. 2016) (pre-Harvey case, wherein plaintiffs flooded by White Oak Bayou alleged county's unmitigated upstream development caused flooding; no affirmative act alleged); *Landgraf v. Nat. Res. Conservation Serv.*, No. 6:18-cv-0061, 2019 WL 1540643 (S.D. Tex. Apr. 9, 2019) (characterizing storm surge from Harvey that pushed debris onto plaintiffs' property an "act of God")). As such, the cases cited by the Government are not dispositive. The CFC's order should be reversed.

D. The Government argument that property interests are limited by the owners' expectations as of the date they acquired the property fails.

The Government alleges that a property owners' interests are limited by their expectations as of the date they acquired the property. (Gov.Brief.22–23). The cases the Government cites do not support this position. *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997) (negligent construction suit against city foreclosed as it pre-dated Texas Tort Claims Act's waiver of immunity); *City of Dallas v. Winans*, 262 S.W.2d 256 (Tex. Civ. App.—Dallas 1953, no writ) (nuisance abatement suit against city caused by discharge of storm waters through under-street culvert)).

The Government argues that because Appellants purchased their properties between 1976 and 2015, the property interests acquired were subject to the Project's flood control operations. (Gov.Brief.23). Simply, this argument is absurd. It is notable that prior to Harvey, the Government's release from the dams never exceeded 4,000 cfs. (App.Brief.11). The result the Government seeks is that if a government project exists near properties, the Government can do as it pleases carte blanche, and landowners' property rights are subject to that project, even if it means the property is flooded for weeks and unusable for months or years. (App.Brief.53). Essentially, what the Government argues for here is a permanent flowage easement which it never purchased in each Appellants' properties by virtue of the Project for which it does not have to compensate Appellants. This argument is not supported by law, nor should it be adopted by this Court. The CFC's order should be reversed.

II. The Government's analysis of Federal law rests on inapplicable statutes and case law.

Just as the Government misinterpreted Texas law and sought to apply cases that have no relevance in the analysis here, the Government does the same with Federal law. (Gov.Brief.24–32).

A. The Flood Control Act ("FCA") does not apply here.

The Government first argues that Section 3 of the FCA expressly disclaims the creation of private property interests in federal flood control structures. (GovBrief.24). The Government also argues that the FCA absolves it of liability for consequential damages. (*Id.*, 25).

The FCA states: "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c. In short, the FCA immunizes the Government from **tort liability** for flooding under the broad circumstances set forth in the statute. *See, e.g.*, *Ideker Farms, Inc. v. United States*, 136 Fed. Cl. 654, 693 (2018). The Government fervently cites *United States v. James*, 478 U.S. 597 (1986) for its broad interpretation of the FCA without acknowledging that *Central Green Co. v. United States*, 531 U.S. 425, 436 (2001) abrogates the sweeping proposition *James* sets forth that "flood" and "flood waters" apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control. *Id.*

Appellants did not allege Government wrongdoing or even attempt

to invoke tort jurisdiction in the CFC. (App.Brief.27–28). Thus, because the FCA immunizes the Government from **torts** related to its flood projects, and because this case is not a tort case, the FCA is not dispositive or applicable here. The Government seems to argue the FCA would apply to any suit associated with flood control projects. (Gov.Brief.25). However, even the cases the Government cites purportedly supporting this proposition acknowledge that "the constitutional prohibition against the taking of private property for public use without just compensation was kept in view" considering the FCA. *Nat'l Mfg. Co. v. United States*, 210 F.2d 263, 270 (8th Cir. 1954) (citing *Sponenbarger v. United States*, 308 U.S. 256 (1939)). FCA and Takings claims can be reconciled by acknowledging that the FCA immunizes the Government from tort liability, and that constitutional claims, which require an affirmative/intentional act of the Government, are not tort claims and are thus not subject to the FCA's limitations.

The Government argues that recognizing Takings liability for "hurricane-induced flooding" would "substantially impede the Government's willingness to undertake beneficial flood control projects." (Gov.Brief.26). The evidence in the record below establishes that the

inundation of Appellants' properties occurred only after the Government made the intentional decision to release the federal waters held in the Reservoirs. (App.Brief.29). The Government's mischaracterization of Appellants' claim as "hurricane-induced flooding" should not absolve it of liability, as that is not the harm from which Appellants seek relief. Instead, Appellants pursue this case against the Government for the Taking that resulted when it directed authorized controlled releases from the dams. (App.Brief.27). The authorized controlled releases are clearly at odds with the notion that the flooding was either uncontrolled or hurricane-induced.

The Government alleges that "the benefitting landowners . . . acquire a private property interest in flood controls" when the Government undertakes flood control projects. (Gov.Brief.27). This position clearly ignores that the Supreme Court, this Court, and state law have recognized flowage easements as a property interest held by landowners. (App.Brief.36–43, flowage easement law and analysis). It also ignores that in this case, the dams were built to benefit and protect Downtown Houston and the Houston Ship Channel. (App.Brief.7).

B. The Government's argument regarding the Corps' police power lacks merit.

The Government argues that Appellants' property rights are subject to the Corps' police power. (Gov.Brief.28). To support this argument, the Government alleges that when government action reflects a "pre-existing limitation" on the landowner's title, no compensation is owed, even for a permanent occupation. (*Id.*). The Government cites *Bowditch v. Boston*, wherein it was absolved of liability for the destruction of real and personal property to prevent the spread of a fire. *Bowditch v. Boston*, 101 U.S. 16 (1880). However, in *Bowditch*, the Government did not start the fire that it sought to stop. Here, Appellants' properties either had not flooded at all prior to the Corps' controlled releases or had flooded and the water had receded by the time the dams were released. Thus, here, the Government's release of the dams is akin to the Government destroying property in the name of putting out a fire that simply did not exist.

Further, *YMCA*, cited by the Government for the proposition that a temporary, unplanned occupation of a building due to military necessity was not a Taking does not support the Government's position. (Gov.Brief.28 (citing *Nat'l Board of YMCA v. United States*, 395 U.S. 85,

90 (1969) (military presence in building overnight following riots; holding "[t]he military had made no advance plans to use petitioners' buildings as fortresses in case of a riot.")). The same cannot be said for this case. During Harvey, the Corps used models to foresee the extent of the downstream inundation that would likely occur, down to the intersection and block. (App.Brief.12). Corps personnel wrote: "If we go over 4000 cfs in Buffalo Bayou we will have water in people's homes. 4000 cfs puts it in their yards, but living spaces stay dry." (*Id.*). The Government **knew** where the damage would occur and intended for downstream properties to house water it released from the dams.

The Government argues again that all properties are subject to exercise of police power. (Gov.Brief.28). The cases the Government cites are simply not instructive to the analysis or conclusion that must be reached here. Instead, the cases cited by the Government are irrelevant. *Bennis v. Michigan*, 516 U.S. 442 (1996) (forfeiture case); *Lech v. Jackson*, 791 Fed. Appx. 711 (10th Cir. 2019) (police attempting to apprehend suspect in home exercise of police power, not eminent domain); *Hurtado v. United States*, 410 U.S. 578 (1973) (grand jury participation when properly summoned is "clearly recognized" public duty); *Barnes v. Glen*

Theatre, Inc., 501 U.S. 560 (1991) (First Amendment case; public indecency statute); *Lambert v. California*, 355 U.S. 225 (1957) (due process case); *Chicago Burlington & Quincy Railway Co. v. Ill.*, 200 U.S. 561 (1906) (rights of railroad to a bridge over natural watercourse not superior to right of public to use the watercourse for the purpose of draining land, as required by state farm drainage act); *Mugler v. Kansas*, 123 U.S. 623 (1887) (Fourteenth Amendment case); *Bachmann v. United States*, 134 Fed. Cl. 694 (2017) (marshals entering and damaging house to arrest suspect exercise of police power, not eminent domain); *Monongahela Bridge Co. v. United States*, 216 U.S. 177 (1910) (statute requiring navigable waters to be free from unreasonable obstruction); *Miller v. Shoene*, 276 U.S. 272 (1928) (state statute with "comprehensive scheme" for condemnation and destruction of infected trees, declaring same public nuisance, not a Taking).

The Government alleges the Corps operated the Project "in accordance with the Manual to protect human lives, Project infrastructure, and private property." (Gov.Brief.30). In their Brief, Appellants established how this, among the other Government actions, is a Taking. (App.Brief.48). Importantly, this case arises from the

Government's deliberate release of federally-held dam water as an integral part of authorized operations. (App.Brief.14). Additionally, the Corps' Manual takes a categorical flowage easement where it had none and where no emergency was declared. (App.Brief.48–49).

The Government argues that Appellants' property ownership is limited by the exercise of police power, which is alleged to be the Corps' operation of the gates during a hurricane. (Gov.Brief.30). The Government seeks a finding that the Corps' operation of dam gates during a hurricane is *always* an exercise of police power. As the Supreme Court stated in *Arkansas Game & Fish*, Takings claims turn on the specific facts that led to the flood. 568 U.S. at 34, 37. The same is true here.

The Government alleges that regardless of the *choice* it made—leave the gates closed or conduct controlled releases—water would have ended up on someone's property. (Gov.Brief.31). This again invokes the trolley problem—does the Government do nothing, leave the trolley on the track it was on, and let the dams spill over? Or does the Government take an affirmative action and divert the trolley, flooding properties downstream that were not in danger of flooding otherwise? As the

Government recognizes, it had a *choice*. When it took an affirmative action in conducting the controlled releases, directing the water over which it had control and flooding properties downstream, it chose to take a flowage easement in downstream properties where it had none. The Constitution directs that it must justly compensate Appellants in these circumstances.

III. The Government's "alternative grounds" upon which the CFC's order should purportedly be upheld lack merit.

The Government argues that the CFC's judgment may be upheld on alternative grounds. (Gov.Brief.32). Specifically, the Government alleges the Corps was not the cause-in-fact of the flooding, the "one-time" flooding that resulted from the Corps' controlled releases was not enough to constitute a Taking, and this Court cannot reverse and render judgment in Appellants' favor. (*Id.*). As established below, each of these grounds lack merit.

A. The Corps was the cause-in-fact of the flooding on Appellants' properties.

The causation standard in a Takings case is: "what would have occurred" if the Government had not acted. *St. Bernard Parish Government v. United States*, 887 F.3d 1354, 1362 (Fed. Cir. 2018); *Alford*

v. United States, 961 F.3d 1380 (Fed. Cir. 2020); *United States v. Archer*, 241 U.S. 119, 132 (1916). To establish causation, a plaintiff must show that in the ordinary course of events, absent Government action, the plaintiff would not have suffered the injury. *St. Bernard Parish*, 887 F.3d at 1362. The Government argues it was not the cause-in-fact of Appellants' injuries, instead alleging that the appropriate causation standard is if the Project had never been built and operated according to the Manual. (Gov.Brief.32).

Appellants disagree that is the causation standard by which to assess this case (App.Brief.57), however, even if that were the standard, a Taking nevertheless occurs when operations "as designed" result in downstream flooding. *See Gragg*, 151 S.W.3d at 546.

Causation was established in the court below as a matter of law. According to the Government's expert, at least eight of the test properties would not have flooded but for the induced surcharges. The Government's expert modeled the actual flooding during Harvey as well as several alternative models, including a "gates closed" model indicating that eight of the 13 test properties would not have flooded but for the induced surcharges. (App.Brief.19). Appellants' expert agrees. (App.Brief.19). At

the ***very least***, there is an issue of disputed fact upon which summary judgment could not have been granted.

The Government argues the Corps' activities in providing flood control protection does not affect a Taking. (Gov.Brief.35). What the Government ignores is that a Taking does not *always* occur when the Corps provide flood control, however, a Taking *can* occur under certain circumstances, as are present here.

The Government also argues that "[i]t is undisputed" that the Corps operated the gates during Harvey in a manner that "mitigated the risk of downstream flooding" by keeping the gates closed. (Gov.Brief.38). The Government only looks at the action of keeping the dam gates closed for a period during Harvey, and completely ignores its risk-increasing activity of opening the gates, which not only increased the *risk* of downstream flooding, but did flood properties downstream.

Finally, the Government argues that Appellants' case is based on Government inaction rather than action and because the Government cannot be liable for a failure to act, only affirmative acts, the Government escapes liability. (Gov.Brief.39). The Government recharacterizes the nature of Appellants' case as a Takings case upon the Corps' failure to

keep the gates closed. (*Id.*). Rather than argue the Government failed to keep the dam gates closed, Appellants brought this Takings case for the **affirmative act of conducting controlled releases**, knowing that the downstream properties would flood and at which cfs the flooding would occur. The Government distorts Appellants' case and frames the case in a way that allows the Government to deny all liability. The record is clear that causation has been established and that the Government was the cause-in-fact of the downstream flooding.

B. The flooding that resulted from the Corps' controlled releases, though temporary, amounts to a Taking.

The Government alleges that even if the downstream flooding can be attributed to the Corps' operation of the dams, "the flooding was unintentional, unanticipated, and transitory," not amounting to a Taking, merely a "possible tort." (Gov.Brief.40). However, assessing this case under proper temporary Takings law, as Appellants did in their Brief, this Court should determine that the Corps' actions amounted to a temporary Taking. (App.Brief.50–56).

To determine whether a temporary Taking occurred, courts must engage in the multi-factor inquiry established in *Arkansas Game & Fish*: (1) the degree to which the invasion is intended or is the foreseeable

result of the authorized Government action; (2) the severity of the interference; (3) time and duration of the flooding; (4) the character of the land at issue; and (5) interference with the owner's reasonable investment-backed expectations regarding the land's use. *Ark. Game & Fish*, 568 U.S. at 38–39. These factors are established and discussed at length in Appellants' Brief. (App.Brief.50–56). Despite Appellants' analysis of this under *Arkansas Game & Fish*, which rejected some of the holdings in *Ridge Line*, the Government argues that the *Ridge Line* elements for determining whether Government action is a Taking or a tort should be followed. (App.Brief.50–53, 60–61). The Government alleges that *Ridge Line* was not abrogated by *Arkansas Game & Fish*, because it did not involve a hurricane. (Gov.Brief.53). Appellants disagree with this assessment and refer the Court to the proper analysis under *Arkansas Game & Fish*, which is set forth in Appellants' Brief. (App.Brief.50–53, 60–61).

Even under *Ridge Line*, the Government's actions constitute a Taking for which the Government must justly compensate Appellants. In *Ridge Line*, this Court explained that the following must be established for Government action to amount to a Taking rather than a tort: (1) the

Government intends to invade the protected property interest, or the asserted invasion is the direct, natural, or probable result of an authorized activity; **and** (2) the nature and magnitude of the invasion constitute a Taking rather than merely inflicting injury to property. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355–56 (Fed. Cir. 2003).

Both elements are satisfied here, as there is ample evidence that the Government intentionally conducted controlled releases, knowing where the water would go, down to the intersection and street, and at what cfs that would occur. (App.Brief.12). Further, the nature and magnitude elements are undoubtedly satisfied here. (App.Brief.52). Following the Government-induced release of federal waters, homes were flooded for days, and some weeks. (App.Brief.20). Beyond the sitting federal water in Appellants' homes, the aftermath of same rendered the properties uninhabitable or unusable for months, and it took some years to be able to move back into their homes. (App.Brief.21). The damages alone were not merely economic—the loss and enjoyment of the property was coupled with extreme economic losses.

1. Appellants satisfy the first **Ridge Line** *element.*

Regarding the first element in *Ridge Line*, the Government alleges

that a Taking could not have occurred because the "flooding of their properties was the 'direct, natural, or probable' result of unprecedented flooding due to a hurricane." (Gov.Brief.42). This completely ignores the Corps' action of opening the dams and conducting controlled releases, which are well-documented in the record. (App.Brief.5, 11–20). Appellants satisfy the first *Ridge Line* element by establishing that the Government intended to invade their property interests by temporarily (and permanently) taking a flowage easement where the Government had none. However, Appellants have also shown that the invasion (the Government's controlled releases) was a direct, natural, or probable result of the authorized activity (controlled releases per the Manual). (App.Brief, *passim*). In short, the Government seems to suggest that the first element cannot be satisfied because Appellants cannot show that the asserted invasion is the direct, natural, or probable result of an authorized activity. For the reasons established in Appellants' Brief and herein, that is demonstrably false.

The Government alleges that because it operated the dams according to the Manual, it did not intend to invade Appellants' property interests and then alleges that no liability can attach when the events

could not be foretold or foreseen. (Gov.Brief.46). Not only does this position contradict the Government's statement that "it was foreseeable at the moment the Corps made the surcharge releases that downstream properties would be flooded," it also ignores the facts that are established in the record. (Gov.Brief.44). Appellants assert that the Manual affects a categorical, permanent Taking of a flowage easement where the Government has none because it is written in such a way that requires the release of the dams onto downstream properties under certain circumstances. (App.Brief.48–50). Additionally, statements by the Corp clearly establish that the Government knew and intended to flood downstream properties. (*Id.*,11–20).

The Government attempts to distance itself from its actions by stating that the surcharge releases were "incidental or consequential injuries." (Gov.Brief.42). The Government cites *Bridge Co. v. United States*, wherein the Supreme Court rejected a Takings claim brought by a pier owner whose pier was unintentionally destroyed by the Government's blasting activities. *Bridge Co. v. United States*, 260 U.S. 125 (1922). The present case is clearly distinguishable from *Bridge Co.* because there is ample evidence that the Government knew, down to the

intersection, where the water it released would go and knew that Appellants' downstream properties would flood. (App.Brief.11–20). The Government also cites *Bedford v. United States*, wherein the Supreme Court held that flooding from a revetment built by the Government was at most an "incidental consequence" of Government action. *Bedford v. United States*, 192 U.S. 217 (1904). In *Bedford*, however, following the construction of the revetment, the channel and current of the Mississippi river were gradually directed toward the plaintiffs' lands and after about six years, the water overflowed their properties. *Id.* at 218–19. *Bedford* is distinguishable from the present case because the suit was not based on an intentional act of the Government, like releasing the dams here. Instead, that case was based on the movement of water over time after the revetment was built. The consequential damages analysis in *Bedford* and *Jackson v. United States* (cited by the Government), which foreclosed Government liability, are clearly distinguishable from the present case, because the suit is not based upon the effects of the dam over time, but based upon an intentional, authorized act of the Government in opening the dams and conducting controlled releasing, knowing exactly where the water would go, and which properties would flood. *See Bedford*, 192 U.S.

at 218–19; *Jackson v. United States*, 230 U.S. 1 (1913).

The Government alleges that though it was foreseeable that downstream properties would flood, does not mean that such flooding was the "direct, natural, and probably result" of the Corps' action. (Gov.Brief.44). Instead, the Government argues that the challenged action must be viewed as a whole, looking at the existence of the dam and the operation of the Project throughout the duration of the storm. (*Id.*). It is precisely by doing so that it becomes evident that, indeed, the Government's controlled releases, knowing downstream properties would flood, was the "direct, natural, and probably result" of the Corps' action. Once the Government impounded the water from Harvey in the dams, the water was in the control of the Government. At that point, the water was no longer floodwater, but instead, became federal water that the Government released, knowing downstream properties would flood. Moreover, the Government argues that the dams were to benefit the Appellants, however, this ignores that the dams were built to benefit and protect Downtown Houston and the Houston Ship Channel. (App.Brief.7).

The Government cites *Sanguinetti v. United States*, *Wilfong v.*

United States, *Columbia Basin Orchard v. United States*, and *Bartz v. United States* to support its argument that a Taking cannot arise from a "random [flood] event" or from "unprecedented rainfall." (Gov.Brief.44). The cases the Government cites simply have no bearing on this case, as they are far from being factually similar and, in fact, highlight the Government's affirmative actions taken here. Moreover, the cases cited by the Government, which require proof of recurrence, have since been expanded by *Arkansas Game & Fish II*, which found that even temporary Government-induced flooding can constitute a Taking. *Arkansas Game & Fish II*, 736 F.3d at 1369. The cases cited by the Government also ignore the permanent Taking alleged by Appellants. (App.Brief.48). *See Sanguinetti v. United States*, 264 U.S. 146 (1924) (government-built canal overflowed intermittently; no affirmative act by the Government); *Wilfong v. United States*, 480 F.2d 1326 (Ct. Cl. 1973) (regarding permanence and intermittence); *Columbia Basin Orchard v. United States*, 132 F. Supp. 707 (Ct. Cl. 1955) (shaft for dam built near spring used by landowner to irrigate orchard; plaintiff alleged spring water was contaminated after lake overflow, snow runoff, and pumped water from reservoir and spilled into spring water; plaintiff used water to irrigate

orchard, sued for Taking after allegedly contaminated water damaged orchard); *Bartz v. United States*, 633 F.2d 571 (Ct. Cl. 1980) (alleging dam caused water to linger on properties and interfere with farming procedures). Moreover, the Government continues to ignore such acts in an attempt to escape liability by portraying the flooding of Appellants' properties as resulting from Harvey naturally, and not from the release of the dams. However, as established in the Brief, Appellants' properties either had not flooded at all prior to the Corps' release of the dams or had flooded and the water receded by the time the dams were released. (App.Brief.27).

The Government accuses Appellants of cherry-picking and isolating its action, rather than examining the construction of the projects, closure of the gates, and "gradual release" of "flood water" from the dams. (Gov.Brief.45–46). However, Appellants are not cherry-picking helpful facts. Because downstream property owners did not contemplate that the Government would open the floodgates and inundate their properties, the Government's prior risk-reducing activities (*i.e.,* building the dam) is irrelevant to the analysis. *St. Bernard Parish*, 887 F.3d at 1367 n.14; *John B. Hardwicke Co. v. United States*, 467 F.2d 488, 490–91 (Ct. Cl.

1972).

Harvey was not an intervening cause that broke the chain of causation between the flood protection the dams provided and the flooding Appellants' experienced, as the Government argues. (Gov.Brief.48). *Cary*, cited by the Government, is irrelevant here. *Cary v. United States*, 552 F.3d 1373 (Fed. Cir. 2009) (lost hunter who illegally started fire was clear intervening cause between government's land management policies related to fire suppression, allowing highly flammable vegetation to build up, and injuries caused to landowners' properties because of the fire). The first *Ridge Line* element is satisfied.

2. Appellants satisfy the second **Ridge Line** *element.*

Appellants satisfy the second *Ridge Line* element, that the Government's interference was of the nature and magnitude to rise to the level of a Taking. *Ridge Line*, 346 F.3d at 1355–56. The Government alleges that Appellants' claim is a "singular event" and that isolated invasions do not constitute a Taking. (Gov.Brief.50).

In *Arkansas Game & Fish II*, this Court rejected this recurrence rule, holding that "[G]overnment-induced flooding can constitute a taking even if it is temporary in direction." *Arkansas Game & Fish II*, 736

F.3d at 1369. Appellants satisfy the *Arkansas Game & Fish II* analysis used to determine whether the Government-induced flooding is a Taking, even if temporary. (App.Brief.60–61; App.Brief.50–53). The Government seems to ignore that its actions, though temporary, were not brief. On the shorter end, for some, the flooding lasted several days. (App.Brief.20). On the longer end, federal waters remained in the properties for up to two weeks. (App.Brief.20). In both temporal circumstances, Appellants were deprived of the use and enjoyment of their properties for months, some years. (App.Brief.53).

Cedar Point, cited by the Government as stating that isolated physical invasions should be assessed as torts, is not instructive here. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (finding regulation granting unions right to invade property a *per se* Taking, distinguishing form government health and safety inspections; acknowledging *Arkansas Game & Fish* and recognizing the factors courts must consider when issue in case is temporary flooding). In citing *Cedar Point*, the Government clearly ignores the Supreme Court's distinction for cases like this one.

The Government then argues that because the recurrence of a

storm carrying a similar amount of rainfall is likely to recur, the Government is not liable here. For the reasons Appellants set forth in their Brief, this conclusion is simply incorrect. When the Government physically takes possession of an interest in property for a public purpose, it has a "categorical duty to compensate the former owner." *Ark. Game & Fish*, 568 U.S. at 31.

Then, the Government states that even Appellants do not disagree that the flooding was unprecedented. (Gov.Brief.52). In this, the Government completely misses Appellants' point. As stated in Appellants' Brief, prior flooding experienced by downstream property owners was brief, insignificant, and nothing like the flooding that occurred here. (App.Brief, 18–19). The significance of the minimality of the prior flooding cannot be understated here: "prior flooding" refers to flooding that occurred because of heavy rainfall that then breached very few of the Appellants' properties naturally. That "prior flooding" was brief, insignificant, and in most property owners' cases, non-existent. In this case, however, the flooding that occurred when the Government released the dams was catastrophic and interfered with use and enjoyment of Appellants' properties for months, and in some cases, years.

Appellants satisfy the second *Ridge Line* element, that the Government's interference here was of the nature and magnitude to rise to the level of a Taking.

C. The Court can properly reverse and render judgment in favor of Appellants.

Lastly, the Government argues that Appellants' remaining arguments should be rejected. (Gov.Brief.54). The Government alleges that Appellants have not established entitlement to a judgment as a matter of law on the theory that a categorical Taking has occurred. (*Id.*). The Government seems to miss that Appellants argue that both a temporary and permanent Taking occurred. The analysis for both is fully briefed in Appellants' Brief. (App.Brief.48–50 (permanent); 50–56 (temporary)).

In response to Appellants' assertion that the Manual affects a permanent Taking, the Government alleges that "the surcharge releases contemplated by the Manual are 'temporary and limited in nature.'" (Gov.Brief.56). However, what the Government clearly misses is that the Manual authorizes these temporary surcharge releases to occur at the Government's discretion and direction, which is the same effect as permanently taking a flowage easement where it has none. (*See*

App.Brief.36, 48–50). The Government ignored the recommendation to purchase flowage easements. (App.Brief.9). The Government cannot now claim the right to a flowage easement where there is none.

Appellants' Brief fully establishes entitlement to judgment in their favor on the issues of temporary and permanent Takings based on the record before this Court.

CONCLUSION

For the foregoing reasons, the decision of the CFC should be reversed, and judgment rendered in favor of Appellants, or alternatively, the decision of the CFC reversed and remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **September 1, 2021**, I electronically filed the foregoing ***Corrected Reply Brief of Appellants in Consolidated Case Nos. 21-1492, 21-1494, 21-1499, 21-1513, & 21-1529*** with the clerk of the court for the Federal Circuit Court of Appeals, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Docket Activity" to the following attorneys of record who have consented in writing to accept this notice as service of this document by electronic means:

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