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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.

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-cv01235-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-cv01399-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-cv01438-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-cv01515-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-cv01545-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-cv01646-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-cv01688-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-cv01954-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-cv00243-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-

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Senior Judge Loren A. Smith.

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PRELIMINARY STATEMENT

Appellants' Opening Brief demonstrated that this case is controlled by the line of Texas cases permitting downstream property owners to maintain takings challenges to government-induced flooding. (Cecere Br. 6-7, 23) None of the Government's arguments change that assessment. This line of cases answers the Government's contention that Texas landowners' title is subject to a "background" principle requiring them to suffer government-induced flooding with impunity, since it includes numerous cases in which Texas courts have forced governments to provide compensation for government-induced flooding even in the face of "unprecedented rainfall." (Gov't Br. 18, 20) These cases likewise describe the precise line between claims impermissibly demanding "perfect flood control" and compensable takings—and put claims demanding compensation when Government floods *some* properties for *others'* benefit squarely on the compensable side of the line. Accordingly, there is no "background" restriction in state property law barring Appellants' takings claim.

The Government's attempts to locate "background" principles of federal law limiting those state property rights is equally unavailing, because the

various sources of federal law the Government invokes, from the police power to the Flood Control Act, have no effect on property rights.

That not only requires reversal of the Court of Federal Claims judgments. It requires rendition of summary judgment in Appellants' favor on their takings claim. The Government cannot contest that its flooding of Appellants' properties under a claim of an unqualified right to conduct future inundations constitutes a flowage easement—a permanent physical occupation of Appellants' land and a classic *per se* taking. And even if this case did come down to the multi-factor analysis for temporary flooding in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), a taking still occurred as a matter of law, because those factors all weigh in Appellants' favor. The individualized assessments the Government identifies matter only for damages. The Government's remaining legal arguments fall short as well because it cannot claim that its actions were "unintentional," did not "cause" a physical invasion, or did not "directly, naturally, and probably" result in the inundation of Appellants' property without changing what all those words mean. In the end, this case is simple: The Government has committed a taking, and now it must pay for it.

ARGUMENT

I. Appellants possess the requisite property rights to maintain a takings claim.

The Government must abandon the Court of Federal Claims' reasoning to defend it. The CFC's decision turned on the notion that Appellants were seeking to *gain* a right to "perfect" government "flood control," and found that right absent from the "'bundle of sticks' afforded property owners downstream of water control structures." (Appx11, 14) But the Government wisely abandons the idea that downstream and upstream property owners possess different rights. And despite paying lip service to the notion that Appellants impermissibly seek "perfect flood control" (Gov't Br. 2), the Government tacitly recognizes that Appellants do seek to *gain* anything: As fee-simple property owners, they possess the *entire* "bundle of sticks," including the unqualified right to exclude others from invading their properties—a right that the Government took by inundating their properties. (Cecere Br. 28)

The Government therefore searches for some "background" legal principle that would establish a "pre-existing *limitation*[]" on Appellants' title to gain the power to flood their properties with impunity. (Gov't Br. 18, 19, emphasis added) But that search is in vain.

A. No relevant background principle of state law limits Appellants' right to exclude the Government from flooding their properties.

Police power. The Government's state-law efforts begin with an invocation of the state police power to conduct "flood control operations." (Gov't Br. 23) But this effort is unavailing. True, Texas law recognizes that property is "held subject to the valid exercise of the police power." (*Id.*, quoting *City of Dallas v. Stewart*, 361 S.W.3d 562, 569 (Tex. 2012)) But an unbroken line of cases holds that this power does not allow the Government to flood an owner's property without providing compensation—even to manage Hurricane Harvey's extensive rainfalls. (Cecere Br. 6-7, 23, citing cases) That line also includes *San Jacinto River Authority v. Medina*, decided after opening briefs were filed, which permitted a state takings claim to go forward that arose from government-induced flooding of Lake Conroe after Hurricane Harvey, and flatly rejected the state's argument that it was immune because its flooding was "responsive to 'a grave and immediate threat to life and property.'" No. 19-0401, 2021 WL 1432227, *11 (Tex. Apr. 16, 2021). These cases cannot be squared with any "background" principle that the "police power" allows government-induced flooding without compensation, even to handle "unprecedented rainfall." (Gov't Br. 18, 20)

Indeed, the Government does not even try. It never mentions several of Appellants' cases, including *Golden Harvest Co. Inc. v. City of Dallas*, 942 S.W.2d 682 (Tex. App. 1997) and *San Jacinto River Authority v. Burney,* 570 S.W.3d 820 (Tex. App. 2018). And its attempt to distinguish the others falls short. The Government dismisses *Medina* because it concerns Texas courts' "statutory jurisdiction" to entertain state takings claims. (Gov't Br. 23 n.2) But the Government neglects to mention that the statute at issue, Tex. Gov't Code § 2007.002, allows jurisdiction only when a compensable "taking" has occurred. This confirms that a "taking" occurs even when the government floods land in response to "a grave and immediate threat to life and property." 2021 WL 1432227, at *2, *11.

The Government would sideline *Tarrant Regional Water District v. Gragg*, 51 S.W.3d 546 (Tex. 2004) by mistakenly focusing on the "water-supply" purpose of the *reservoir* at issue. (Gov't Br. 22) But what matters instead is the purpose of the government-induced *flooding*—the subject of the owners' challenge and the controlling inquiry under Texas law—which was to alleviate problems from "extremely heavy rains." 151 S.W.3d at 550. Clearly heavy rains do not wash away property rights.

The Government also never mentions that the holding in *Brazos River Authority v. City of Graham* vitiates its entire argument, holding that governments are "generally required to proceed under the power of eminent domain rather than under the police power," even when conducting "flood control." (Cecere Br. 36, quoting 354 S.W.2d 99, 105 (Tex. 1961)) It also never mentions that *City of Graham* disposes of the Government's favorite cases. The Court dismissed *Motl v. Boyd*, 286 S.W. 458 (Tex. 1926) because it involved "riparian" rights, which concern management of "waters *running in a stream* adjoining [the owner's] land," saying nothing on the "wholly different question" of whether the Government can invade *land* with impunity. 354 S.W. at 104, 105, 106 (emphasis added). *City of Graham* similarly dooms the Government's reliance (at 19) on *Cummins v. Travis County Water Control & Improvement District No. 17*, which concerns "littoral" rights—landowners' "rights to use the *water* adjacent to their land" when it "borders a lake." 175 S.W.3d 34, 42 (Tex. App. 2005). The only "background" property limitation *Cummins* recognizes therefore concerns the government's authority to handle *water in lakes*. It grants the Government no similar freedom to invade *land* without compensating *landowners*.

The Government understandably ignores these controlling aspects of *City of Graham* to focus on an irrelevant detail: The reservoir causing the flooding was built "after" the water treatment plant it flooded. (Gov't Br. 23) But if the Government was right, the property owner's claim would have been rejected *regardless* of when the dam was built. The timing is irrelevant.

The Government also seizes on cautionary language in *Harris County Flood Control Dist. v. Kerr* suggesting that property owners may not sue the government "on the theory that [it] could have done more" to prevent flooding. (Gov't Br. 20-21, quoting 499 S.W.3d 793, 804 (Tex. 2016)) Except *Kerr* itself distinguished such claims sounding in "negligence" from those contending that "the government [made] a conscious decision to subject particular properties to inundation so that other properties would be spared." 499 S.W. 3d at 807, 816. *Kerr* confirms that takings liability would not lie in the former instance but *would* lie in the latter. And this case is the latter.

Kerr's holding aligns Texas takings law with its federal counterpart, which follows the principle that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*

v. United States, 364 U.S. 40, 49 (1960). Despite what the Government contends (at 27), this principle resolves this case.

The "police power" lies nowhere on the line between impermissible demands for "perfect flood control" and compensable takings. And Appellants make no demand for "perfect flood control." They contend the Government inundated their properties to benefit upstream property owners. And thus, the Government cannot explain how its resort to the "police power" can be squared with these controlling Texas authorities.

The Government instead seeks refuge in three cases from a single Texas court of appeals in Beaumont that never mention the "police power." (Gov't Br. 20, citing *Sabine River Authority v. Hughes*, 92 S.W.3d 640 (Tex. App. 2002); W*ickham v. San Jacinto River Authority*, 979 S.W.2d 876 (Tex. App. 1998); *Waller v. Sabine River Auth. of Texas*, No. 09-18-00040-CV, 2018 WL 6378510 (Tex. App. Dec. 6, 2018)) These cases actually turn on Beaumont's supremely technical rule that transforms takings liability into a comparison between reservoir *inflows* and *outflows*. (Cecere Br. 22, citing *Sabine River Auth.*, 92 S.W.3d at 642) The Government does not explain the logic behind this rule, or how these limits on Texas *takings* law constitute limits on Texans' property rights. (Cecere Br. 35) Nor does it mention that Beaumont's quirky

rule did not exist before 1998 and has been rejected by the court governing the areas around Houston where Appellants' properties reside. (*Id.* 40, citing *Burney*, 570 S.W.3d at 836) Accordingly, Beaumont's hyper-technical dam-operations rules are no more a restriction on Appellants' titles than the "police power."

Owners' Expectations. The Government fares no better with its reliance on state law to suggest that Appellants' legally enforceable "expectations" (Gov't Br. 22-23) included an understanding that their title was subject to the Government's right to conduct uncompensated floodings simply because they purchased their properties after the Reservoirs' "construct[ion]" and the Manual's "adopt[ion]." (*Id.* 23) Appellants challenge not the Reservoirs' *construction*, but their *operation.* (Cecere Br. 37) Nothing about the Reservoirs' mere *existence* could have suggested to Appellants that the Government might operate them in a manner that would involve flooding Appellants' lands to protect upstream owners. Just the opposite. Before Hurricane Harvey, the Government had never opened the floodgates during heavy rains. It had even given the public assurances that it "will not open the dam to a point where it will cause flooding downstream." (Cecere Br. 11-12, quoting Appx4341-4342) Appellants expected protection, not inundation. And

although the Manual allows for surcharge operations, the Government does not dispute that the public was unaware of the Manual or its contents. (*Id.* 12, citing Appx6) This unknown Manual could not change their expectations.

"Act of God." The Government's reliance (at 21) on the "Act of God" doctrine is equally flawed. The Government never claims this is a "background" limitation on Appellants' property rights, instead mentioning it only as a "helpful analogy." (*Id.* 14) Rightly so, because the "Act of God" excuse does not limit property rights; it provides only a defense to tort liability that the Government has not raised and cannot satisfy. (Cecere Br. 31-33) And even the Government's analogy falls apart. Hurricane Harvey may have been an Act of God, but it did not create "waters that" the Corps could not "control." (Gov't Br. 22, quoting *United States v. James*, 478 U.S. 597, 605 (1986)) The Government *did* control them—by directing them onto Appellants' properties. That decision was entirely voluntary, and solely for upstream properties' benefit. Despite what the Government repeatedly insists (at 16, 22, 34), the Reservoirs' "structural integrity" was never in question (*see* Cecere Br. 15).

Furthermore, the Government's supposed "dilemma" that it faces takings claims from both upstream and downstream owners is entirely of its

own making. (Gov't Br. 31) It results from the Government's unilateral choices to close the gates to flood upstream properties, then to open those gates and inundate downstream properties. Furthermore, the Government's difficulties managing Hurricane Harvey's rainfall pale in comparison to the life-altering devastation Appellants have suffered as the result of the Government's choices. Solving those rain-management problems cannot involve creating new, never-before-recognized property restrictions on landowners' title. And it certainly cannot justify the CFC's decision that forces downstream property owners to suffer the result of those management decisions *alone*. The Government's pleas to be relieved of responsibility under state law are therefore ineffective.

B. Federal law also presents no limitation on Appellants' property rights.

Federal police power. The Government's reliance on federal law is similarly flawed. The Government first invokes the federal "police power," and argues for the broadest possible conception of that power, insisting that it can take without compensation whenever acting for "public health, safety, and morals." (Gov't Br. 29, quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991)) But the Government neglects to mention that the Supreme Court has held that this idea is *never* true for floods (Cecere Br. 59), or for "physical

'invasion[s]' of [a landowner's] property," which require compensation "no matter how weighty the public purpose behind" the intrusion. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). And it has not been true for regulatory takings since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). (*See* Cecere Br. 58) The Government therefore cannot circumvent the Takings Clause by invoking the police power.

The Government instead attempts to smuggle the police power in the back door as a "background" restriction "inhere[ing]" in Appellants' "title itself." (Gov't Br. 28, quoting *Lucas*, 505 U.S. at 1029) *Lucas* forecloses that attempt, making clear that the police power is not among such restrictions, which must come from "the restrictions that background principles of the *State's* law of property and nuisance already place upon land ownership." 505 U.S. at 1009-10, 1029 (emphasis added). As explained above, state law does not permit the Government to flood with impunity under the "police power." And the Government does not claim that its power to regulate nuisances emanating *from* a person's property can justify sending floodwaters *onto* that property to protect others. Accordingly, *Lucas* and *Mahon* refute the Government's misguided notion that federal law makes "all property ... subject to certain core exercises of the police power." (Gov't Br. 28)

The Government's other authorities (at 28-30) cannot allow what *Lucas* forecloses. Some are not takings cases at all. *See Miller v. Schoene*, 276 U.S. 272, 246, 277-78 (1928) (upholding statute allowing state to destroy diseased cedars without compensation under a "due process" challenge); *Bowditch v. Boston*, 101 U.S. 16, 17-19 (1880) (involving claim under a local ordinance for fire-prevention victims).

Others were overruled by *Mahon* nearly 100 years ago. For example, *Chicago, Burlington & Quincy Railway Co. v. Illinois*, 200 U.S. 561, 593-94 (1906), came nearly 20 before *Mahon*, so its observations on the "police power" to undertake regulatory takings have been overruled. And *Lucas* itself highlighted *Mugler v. Kansas*, 123 U.S. 623 (1887) as among the "harmful or noxious uses" cases that were an "early attempt" to justify the categorical exclusion of regulatory actions from takings liability before *Mahon* reversed that categorical exclusion. 505 U.S. at 1022. *Mugler* gains no persuasive force merely because it was cited for an unrelated point in *Bachmann v. United States*, 134 Fed. Cl. 694 (2017). (*See* Gov't Br. 29)

The remainder of the Government's cases do not involve invocations of the police power to evade takings liability at all. Some turned on causation. *See Nat'l Board of YMCA v. United States*, 395 U.S. 85, 88, 93 (1969) (holding that

"temporary, unplanned occupation" of buildings by military forces was no taking where "damage" was caused by rioters, not occupying troops). Some turned on the absence of a "public use." *Lech v. Jackson*, 791 Fed. App'x 711, 718 (10th Cir. 2019) (Gov't Br. 29) (holding that "when law enforcement officials damage private property in the process of enforcing criminal law, they ... do not take [it] for public use") (internal quotation omitted). Some turned on rights and responsibilities outside of the police power. *Bennis v. Michigan*, 516 U.S. 442, 450 (1996) (relying on the principle that a criminal "forfeit[s]" title by using it as an "instrumentality" of a crime"); *Hurtado v. California*, 410 U.S. 578, 579, 588-89 (1973) (holding that government was not required to pay a detained material witness because "[t]here is a public obligation to provide evidence," so the government need not "pay for the performance of a public duty it is already owed").

Even *Monongahela Bridge Co. v. United States*, 216 U.S. 177 (1910), which the Government highlights (at 29) turned not on the police power, but on a proper application of the state's power to abate nuisances. And that leaves the Government with no authority to support its overreaching position that it can take property with impunity simply by invoking "public safety." (Gov't Br. 30)

The Flood Control Act. The Government's reliance on the Flood Control Act (FCA) is equally meritless. The Government does not, and cannot, explain how Congress could exempt any category of takings claims from the Fifth Amendment. (Cecere Br. 61) Accordingly, it makes no difference whether Congress sought through the FCA to extend the Government's "sovereign immunity" to "'any' liability associated with flood control," that it stated this intent "in the broadest and most emphatic language," or that it considered this immunity a condition for its willingness to undertake flood control projects. (Gov't Br. 24, 25 quoting *United States v. James*, 478 U.S. 597, 606-07, 608 (1986)) A statute cannot trump the Constitution.

The Government's attempt to convert the FCA into a "backdrop" principle limiting Appellants' property rights is also ineffective. (Gov't Br. 25) Congress's understanding of the limits of takings liability, and the extent of the Government's sovereign immunity, cannot change Appellants' property rights. So even if the law changed on the scope of the Takings Clause after the FCA was enacted, a single Congressman's understanding of that no-longer-current state of the law cannot acquire a tenure surviving the change. (*id.* 26 citing 69 Cong. Rec. 7,106 (1928) (remarks of Rep. Cox)) In any event, since the FCA's enactment, the Supreme Court has found it to be no obstacle to

inverse condemnation takings claims for government-induced flooding. *See*, *e.g.*, *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 809 (1950) ("This case comes within the principle that the destruction of privately owned land by flooding is 'a taking' to the extent of the destruction caused."); *United States v. Dickinson*, 331 U.S. 745, 746-50 (1947) (affirming takings by government-induced flooding). This long-settled history ensures that a ruling for the Appellants in this case, just like the decision in *Arkansas Game*, will not yield any new "deluge of takings liability" that might cause Congress to reconsider its position on funding federal flood control projects. 568 U.S. at 37. This long-settled history also settled the FCA's scope long before Appellants acquired their properties, ensuring that neither it nor any other law invoked by the Government restricted Appellants' right to compensation for deprivation of their property rights.

II. Appellants are entitled to judgment on their takings claims.

The Government likewise identifies no obstacle to entering summary judgment in Plaintiff's favor on their takings claim, because the Government's efforts constitute a taking as a matter of law. The Government's attempts to prove otherwise are fruitless.

A. The Government's invasion of Appellants' properties by flood constitutes a taking as a matter of law.

The Government's invasion of Appellants' property is the classic categorical taking. It constitutes a flowage easement—a permanent servitude on land. The Government's attempt to distinguish the long line of cases that have found categorical takings to occur when the government takes an easement across property are unavailing. These cases do not concern only "granting of permanent access to third parties across property." (Gov't Br. 55) Look at *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982), which did not afford cable companies *access* inside homes to install cable boxes—it provided space for cable boxes themselves. And in any event, the Government cannot explain how easements allowing people access or equipment access are any different than its easement allowing *water* access across Appellants' property.

Nor can the Government explain how its flowage easement is more "temporary" than these other servitudes. The flooding *itself* might have been "temporary and limited in nature"—just as people might use an access easement only rarely and intermittently. (Gov't Br. 56, quoting *Loretto*, 458 U.S. at 434) What matters is that *the right* the Government claims to intrude on Appellants' property is unquestionably "permanent and continuous." (*Id.*

quoting *Nollan*, 483 U.S. at 832) As *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546-47 (2005) explained, such "permanent physical occupation" of land is what makes an easement a *per se* taking.

Nor can the Government explain (at 55) why it matters that the flooding resulted from activities "outside" Plaintiffs' properties. That only matters when the challenged government activity is off-premises construction causing passive flooding and "consequential" damages. (Gov't Br. 56, quoting *Loretto*, 458 U.S. at 428) It does not matter when the challenged activity is purposeful flooding *onto* Appellants' land, and the damages are direct. Accordingly, nothing suggests the Government's activities did not constitute a categorical taking as a matter of law.

But Appellants are entitled to summary judgement on their takings claims even under *Arkansas Game*'s "multifactor" analysis for "temporary" flooding. (Gov't Br. 56) The Downstream Plaintiffs moved for summary judgment claiming these factors were satisfied. (Appx952) And the Government cannot identify any genuine "disputes of material fact" preventing this Court from resolving those factors in the first instance. (Gov't Br. 57) The Government claims the parties dispute the "levels and duration" of flooding and the resulting disruptions to Appellants' enjoyment of their

properties. (*Id.* 57-58) But no dispute exists on the issue that matters: Each of the Downstream Plaintiffs' properties experienced flooding that would not have occurred absent the Government's decision to open the floodgates—and that flooding is typical of the flooding the Appellants experienced. That establishes a taking. The factual disputes are relevant only in determining damages.

Nor can the Government explain (at 58) how the "character" of Appellants' land and "reasonable investment-backed expectations" could be so "subjective" as to require further factual development. *None* of the Appellants had experienced Government-induced releases from the Reservoirs before Harvey. And in public, the Government had promised *not* to engage in surcharge releases to benefit upstream properties. (*Supra*, p. 9) How could any landowner reasonably expect before Hurricane Harvey that their title was subject to a government right to flood their land for others' benefit? Accordingly, the Government cannot identify any factual issues preventing entry of summary judgment.

B. None of the Government's other arguments defeat Appellants' takings claims.

The Government also cannot identify any legal deficiency in Appellants' takings claims.

1. The Government caused the physical invasion of Appellants' properties by flooding.

There should be no question that the Government caused the flooding that inundated Appellants' properties and destroyed their homes, businesses, and personal possessions. That is far more than a "possibility." (Gov't Br. 35) It is undisputed (Cecere Br. 42-43), despite the Government's attempts at obfuscation. The Government hypothesizes that keeping "the gates closed for the entire duration of Hurricane Harvey" might have harmed upstream property owners or affected the dams' "structural integrity." (Gov't Br. 34) Yet harms that *might* have occurred if the Government acted differently cannot break the chain of causation between the acts the Government *did* take and "the downstream flooding that actually occurred." (*Id.* 35)

The Government's obfuscation continues (at 32-34) with its contention that *St. Bernard Parish Government v. United States*, 887 F.3d 1354 (Fed. Cir. 2018) required Appellants to prove they would have fared worse in a world in which the Reservoirs had "not been constructed" to maintain a takings claim. The *St. Bernard Parish* standard is reserved for situations where the government construction operation is alleged to have caused passive flooding. Only then does it make sense to conduct the cost-benefit analysis *St. Bernard Parish* requires and examine whether the entire project should have been

built to evaluate "the entirety of government actions that address the relevant risk." (Gov't Br. 32, quoting 887 F.3d at 1364) The Government cannot explain how this reservoir-construction causation concept can be applied cases involving reservoir-*operation*—or how the risk-mitigating benefits of dam construction can be logically compared to the risk-increasing harms of operating it. (Cecere Br. 44-45)

The Government instead tries (at 37) to artificially combine the Reservoirs and their floodgates into a single "project." But *St. Bernard Parish*'s application does not depend on whether government actions can be lumped into "one" project or "two." (*Id.*) The "formal relat[ionship]" between risk-reducing and risk-increasing activities is irrelevant. 887 F.3d at 1367. The analysis focuses instead on the nature of the government "actions" challenged and whether one "mitigates the type of adverse impact" caused by the challenged action. *Id.* When the challenged "action" is reservoir operation, the analysis is naturally restricted to reservoir operations.

Regardless, even an analysis comparing the benefits of the Reservoirs to the harms of their operation must be resolved in Appellants' favor, because the passive protection provided by the reservoir cannot "mitigate" the

Government's active, purposeful releases of water from the floodgates. The Government provides no reason to conclude otherwise.

The Government likewise cannot overcome *St. Bernard Parish*'s rule, based on *John B. Hardwicke Co. v. United States*, 467 F.2d 488 (Ct. Cl. 1972), that when the government takes one action that reduces flooding risk before taking a second action that increases flooding risk, "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." 887 F.3d at 1367 n.14. (*See* Cecere Br. 47)

The Government dismisses this statement as dictum, but it follows directly from *St. Bernard Parish*'s holding that only risk-reducing actions "mitigat[ing]" the challenged action are considered in the causation analysis. 887 F.3d at 1367. An *earlier* risk-reducing action cannot "mitigate" a *later* risk-increasing one, thereby "breaking" the causal chain, absent some evidence that outside observers would consider them part of a single whole. *Id.* at 1365.

And there is no evidence of any contemplated connection between construction and operation in this case. The Government emphasizes evidence that *it* anticipated having no gates at all when the Reservoirs were first built. But in *John B. Hardwicke* it was clear that what matters is not the

government's contemplation, but the "contemplate[ion]" of a "buyer of land" who purchases and develops land in reliance on the then-existing state of the world. 467 F.2d at 490. And no prospective purchaser who purchased property when the Reservoirs were built "knew or should have known" that the Government would use them to intentionally inundate downstream landowners' property. *Id.* (*See also* Cecere Br. 47)

The Government's backup position is equally flawed. It offers that a causation analysis properly focused on the "operation of the Project during Hurricane Harvey" would have to postulate a but-for world in which the gates had been left open "throughout the whole storm." (Gov't Br. 37-38) But this newly minted position cannot work. Rather than blindly assuming the gates had been left open *throughout* the Harvey-induced rainfall, a proper cost-benefit analysis under *St. Bernard Parish* must involve comparing the benefit provided by the closed gates *during the time* they were closed to the burdens imposed *once* they were opened. That is the only way to determine how the risk-decreasing and risk-increasing activities work *together—the "entirety of government actions"*—to determine whether Appellants' "overall" "expectation of flooding" would have been lower. 887 F.3d at 1364 (emphasis added, cleaned up).

That analysis also comes out in Appellants' favor. Even if initially closing the gates provided Appellants some benefit that was not washed away by later opening them—a proposition on which the Government offers speculation but no proof—that benefit did nothing to mitigate the harm Appellants suffered once they were opened, because those supposed benefits did not prevent the inundation of Appellants' properties. There is no break in the causation chain.

2. The Government's invasion of Appellants' properties was the direct, natural, and probable result of the Government's active, intentional conduct.

The Government's efforts to distance itself from Appellants' injuries are similarly unavailing. The Government did not merely "fail to take steps" to save Appellants' properties. (Gov't Br. 39) Nor was the flooding "[a]ccidental" or "unintended." (*Id.* 42, quoting *In re Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 799 F.2d 317, 326 (7th Cir. 1986)) Instead, the Government's decision to open the floodgates was a specific, predicated, and intentional act that set a plan into motion—a plan to benefit upstream properties at the expense of those downstream. The flooding that resulted from the Government's plan was also the "direct, natural, [and] probable result" of the Government's actions. *Ridge Line Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003). (Cecere Br. 52) Indeed, the Government concedes that "it was foreseeable at the

moment made the surcharge releases that downstream properties would be flooded." (Gov't Br. 44) The flooding therefore was not an "incidental" or "consequential" result of the Government pursuing some other plan. (*Id.* 42, quoting *Ridge Line*, 346 F.3d at 1355) The flooding *was* the plan.

That puts this case worlds away from cases like *Keokuk & Hamilton Bridge Co. v. United States*, which involved a situation where a pier was "*unintentionally* destroyed" by the Government's blasting activity to widen a river channel, making the pier's destruction an "incidental" consequence of the Government's plan. (Gov't Br. 43, citing 260 U.S. 125, 126, 127 (1922)) Nor is this case like *Bedford v. United States*, 192 U.S. 217, 218 (1904), in which the Government *intended* to build a "revetment" to prevent erosion of a point in the Mississippi River and had no intention of flooding anyone's properties. This case is also unlike *Jackson v. United States*, 230 U.S. 1, 23 (1913), where the government's construction of a levee to prevent flooding in one place unintentionally caused flooding somewhere else. These are situations in which flooding causes remote or consequential damages. But that is not this case, where the Government *meant* to flood Appellants' properties to prevent others' from flooding. The Government is therefore wrong to suggest "intent

is not alleged" in this case. (Gov't Br. 47) This is a case that is *resolved* on intent.

Unable to contest that it acted "intentionally" and that its actions caused "direct, natural, and probable" harm, the Government instead attempts to change what these terms mean. The Government contends its intent is undermined by the fact that its actions occurred against the backdrop of a hurricane, making the Government's connection to Appellants' injuries too "attenuated." (Gov't Br. 43) But attenuation is a causation concept and irrelevant to intent. Harvey may have been a storm of "historic dimensions," but it cannot change Government actors' *state of mind*. (*Id.*)

Moreover, the Government's position does not even work as causation analysis. Harvey is no intervening force occurring *after* the Government's actions that could break "the chain of causation between the authorized act and the injury." (Gov't Br. 48) (internal quotation omitted) Harvey is merely one event in the chain of causation—one occurring before *the Government* intervened. That makes this case very different from *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 708, 709 (Ct. Cl. 1955), where the pumping of a small amount of water was not a taking because it "would not have caused" a lake to overflow absent the deluge caused by "unusually heavy

rainfall" that dramatically added to the flow. Under those circumstances, floods induced by the government become "secondary" to overwhelming floods induced by nature. *Bartz v. United States*, 633 F.2d 571, 577 (Ct. Cl. 1980). But here, the Government's efforts were primary: Absent opening the gates, Appellants' lands would have suffered far less flooding—or none.

This case is also different from *Sanguinetti v. United States*, where a flood's severity overcame the water-channeling "capacity" of a canal the government built. 264 U.S. 146, 148 (1924). The Court there absolved the government of takings liability for flooding it *could not stop*. That decision cannot excuse the Government of liability for flooding it *started*. And *Wilfong v. United States*, 480 F.2d 1326, 1329 (Ct. Cl. 1973) simply distinguishes random, one-time, events like major floods from the "inevitably" recurring events that were required for takings liability before *Arkansas Game*. (*See infra*, p. 30) Together, these cases establish several different paths by which natural disasters, rather than government actions, could be considered "*the* cause" of flooding. (Gov't Br. 45) But this case does not lie down any of those paths. Accordingly, none of them explains how Harvey "breaks" the chain of causation—much less make the Government's intentional releases unintentional.

The Government also cannot establish that transformation by noting that the dams were built to prevent downstream flooding, or that the Government *could* have taken action to make the flooding from Harvey "far worse." (Gov't Br. 45) When the Government engages in different actions with different purposes, that does not mean any of those actions *lack* purpose. And despite what the Government contends, *Cary v. United States*, 552 F.3d 1373 (Fed. Cir. 2009) does not require Appellants to challenge the Reservoirs' *entire* flood-control system to obtain compensation. While *Cary* required a landowner to challenge an entire set of "policies" without picking and choosing among them, that was only because the landowners' complaint challenged the government's "land management *policies*"—plural. *Id.* at 1375 (emphasis added). Nothing in *Cary* implies that a landowner cannot limit her complaint to a single governmental action among several.

The Government fares no better in trying to explain how its actions were anything but the "direct, natural, [and] probable" result of opening the floodgates. *Ridge Line*, 346 F.3d at 1355. The Government admits that this standard from *Ridge Line* normally equates to "foreseeab[ility]." (Gov't Br. 47, quoting *Arkansas Game*, 538 U.S. at 39) And while the Government is right (at 47) that foreseeability is not always "sufficient" to satisfy *Ridge Line*'s

"direct, natural, [and] probable" standard, that variance does not help it. As *Ridge Line* suggests, the consequences of government action must be more than merely "foreseeable" or "probable." They must also be "natural."

That is why the Court denied the takings claim in *Cary*. (Gov't Br. 47). *Cary* held that even when government actions create a risk of "foreseeable" harm to others—like the government's enactment of policies that "increase[] the risk of wildfire"—the fire that results is not the "natural" consequence of the policies when some "intervening activity" is necessary to "set" the result "in motion," like the hunter lighting the flame. *Cary*, 552 F.3d at 1378, 1379 n.*.

But *Cary*'s analysis is inapplicable here. The floods that inundated Appellants' property followed naturally from the Government's decision to open the flood gates. No intervening event set those waters into motion—including Harvey. (Gov't Br. 48) Harvey may have supplied the water that made it necessary to open the floodgates, but once the Government acted to open those floodgates, nothing else was needed to produce the flood. And that makes Appellants' injuries the "direct, natural, [and] probable" result of the Government's actions.

3. The Government's invasions were sufficiently severe and substantial to constitute a taking.

Finally, the Court must reject the Government's position that the "nature and magnitude" of the flooding it induced—so significant as to displace Appellants from their homes and businesses and cause them lasting, sometimes permanent damage—is too "transitory" to constitute a taking. (Gov't Br. 40, 41) This argument hinges on a single line from *Ridge Line* that "one or two floodings" are insufficiently "substantial and frequent" to justify a taking, and that "repeated" or "inevitably recurring" invasions are necessary. 346 F.3d at 1355, 1356-57. This rigid, bright-line, "one-free-flood" argument did not survive *Arkansas Game*.

As this Court recognized on remand from the Supreme Court, *Arkansas Game* specifically discarded the "inevitably recurring" requirement in "holding that government-induced flooding can constitute a taking even it if is temporary in duration" and therefore will not "recur." *Arkansas Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1369 (Fed. Cir. 2013). More generally, *Arkansas Game* discarded the entire idea that takings liability turns on such "blanket exclusionary rule[s]" as whether the Government conducted one flood or two. 568 U.S. at 37. *Arkansas Game* also replaced *Ridge Line*'s "substantial and frequent" bright-line rule with a multi-factor

inquiry that measures the "[s]everity of the [government's] interference." *Id.* at 39.

No longer is takings liability answered by mechanical questions about whether the flooding was permanent or temporary, or happened once or twice. Liability hinges instead on the *overall* severity of the invasion and what it signifies. As the Court confirmed this past term in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2078 (2021), "[i]solated physical invasions," may still sound in trespass, but when they are "undertaken pursuant to a granted right of access" then they are "appropriations of a property right" and a taking. That is what defines the line between the "truckdriver parking on someone's vacant land to eat lunch," *id.* at 2078 (quoting *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991)), and the government in *Portsmouth Harbor Land & Hotel Co. v. United States,* which would have completed a taking the moment it "fire[d] a single shot or put a fire control upon the land," when it did so "with the admitted intent to fire across the claimants' land" at will. 260 U.S. 327, 329 (1922).

That line between naked incidental trespasses and invasions under a claim of right is the line that the Government crossed. The flood here was not a "one-time" situational response. (Gov't Br. 50) It was conducted pursuant to

the Manual's directions for handling heavy rainfalls—a Manual that remains the Corps policy for operating the Reservoirs. And that makes the invasion an "appropriation[] of a property right." (Gov't Br. 50, quoting *Cedar Point Nursery*, 141 S. Ct. at 2078)

The Government emphasizes that it is unlikely that the Manual's surcharge provisions will be utilized again for many years. (Gov't Br. 52) But the inquiry under *Cedar Point* and *Portsmouth Harbor* does not turn on the *likelihood* of future invasions. It turns on the significance of past ones, and whether they suggest an "intent" to invade the plaintiff's land at will. 260 U.S. at 329. And the Manual undoubtedly expresses such intention. After all, the Government's own expert admits that future surcharge floods will "inevitably" occur. (Cecere Br. 15, quoting Appx2728) The only question is when. That alone imposes a "permanent liability to intermittent but *inevitably* recurring overflows." *United States v. Cress*, 243 U.S. 316, 328 (1917) (emphasis added). And that would have satisfied *Ridge Line* even before *Arkansas Game*.

In contending that *Ridge Line*'s rigid flood-counting test remains good law, the Government cannot account for *Cedar Point* or *Portsmouth Harbor*. And its attempt to explain how that test survived *Arkansas Game* is unpersuasive. The Government emphasizes that this Court and the Supreme

Court in *Arkansas Game* both considered the "duration" of the taking. (Gov't Br. at 53) But duration is just as relevant in measuring the severity of an intrusion as it is to flood-counting. The Government also emphasizes *Arkansas Game*'s reliance on cases involving "[i]solated invasions" (*id.*), but the idea that isolated invasions may not be severe enough for a taking also does not permit reducing the takings inquiry to mere flood-counting. Accordingly, these isolated snippets cannot undermine the plain letter of *Arkansas Game*'s holding, or the obvious thrust of its reasoning, both of which flushed *Ridge Line*'s rigid flood-counting rules.

The Government (at 52) fares no better with its reliance on *Fromme v. United States*, 412 F.2d 1192 (Ct. Cl. 1969) and *North Counties Hydro-Electric Co. v. United States*, 151 F. Supp. 322 (Ct. Cl. 1957)—both progenitors of *Ridge Line*'s "one free flood" rule that *Arkansas Game* rejected. (Gov't Br. 52) The Government's reliance on *YMCA* is also misplaced, because the question in *YMCA* was not whether one-time damage to a building was "direct and substantial enough" to constitute a taking, but whether it involved "enough *government involvement*" to constitute a taking, because the damage was caused by rioters, not the government forces trying to halt them. (Gov't Br. 51, quoting 395 U.S. at 93, emphasis added)

In sum, it remains true that courts consider the "nature and magnitude" of government invasions in determining whether a taking has occurred, and "isolated invasions" may not constitute a taking. (Gov't Br. 54) But rigid flood-counting is no longer the mechanism for measuring that "nature and magnitude" of interference. And the nature and magnitude of interference with Appellants' rights here is more than significant enough to maintain a takings claim. Appellants are entitled to summary judgment.

CONCLUSION

Appellants respectfully request that the Court reverse the judgment of the Court of Federal Claims, render judgment for Appellants on their takings claims, and remand for further proceedings on damages.

Respectfully submitted,

/s/ J. Carl Cecere

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 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 the following counsel of record:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. Cir. R. 32(b)(1) because it contains 6,893 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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August 24, 2021 */s/ J. Carl Cecere*

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