No. 11-597

In The Supreme Court of the United States

ARKANSAS GAME & FISH COMMISSION,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF AMICUS CURIAE OF OWNERS' COUNSEL OF AMERICA IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

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

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

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IDENTITY AND INTEREST OF AMICUS CURIAE

Owners' Counsel of America (OCA) is a national network of the most experienced eminent domain and property rights attorneys who seek to advance, preserve and defend the rights of private property owners and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right" and the basis of a free society. *See* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998).[1]

As the lawyers at the front lines of takings law, OCA's members understand the importance of the issues in this case, and how the rule adopted by the Federal Circuit, if allowed to stand, will undermine the check on the unbridled exercise of governmental powers that the Takings Clause provides. Physical destruction of property is no less a taking simply because the events that caused it were temporary.

OCA brings unique expertise to this task. OCA is a non-profit member-based organization, organized under IRC § 501(c)(6) and sustained solely by its

[1] All counsel of record consented to the filing of this brief. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus made a monetary contribution toward the preparation or submission of this brief.

members. Only one member lawyer is admitted from each state. Since its founding, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and to make that opportunity available and effective to property owners nationwide. OCA member attorneys have been involved in landmark takings law cases in nearly every jurisdiction nationwide, including cases at issue in the case at bar. Additionally, OCA members and their firms have been counsel for a party or amici in many of the eminent domain and takings cases this Court has considered in the past forty years. *See*, *e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008). Most recently, OCA filed an amicus brief in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010).

OCA members have also authored treatises, books, and law review articles on takings, eminent domain, and compensation, including chapters in the seminal treatise NICHOLS ON EMINENT DOMAIN. *See*, *e.g.*, MICHAEL M. BERGER, TAKING SIDES ON TAKINGS ISSUES (Am. Bar Ass'n 2002) (chapter on: *What's "Normal" About Planning Delay?*); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U.J.L. & POLICY 99 (2000); Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 9 LOY. L.A.L. REV. 685 (1986); WILLIAM G. BLAKE, THE LAW OF EMINENT DOMAIN – A FIFTY STATE SURVEY (Am. Bar Ass'n 2012) (editor); LESLIE A. FIELDS, COLORADO EMINENT DOMAIN PRACTICE (2008); JOHN HAMILTON, KANSAS REAL ESTATE PRACTICE AND PROCEDURE HANDBOOK (2009) (chapter on *Eminent Domain Practice and Procedure*); JOHN HAMILTON & DAVID M. RAPP, LAW AND PROCEDURE OF EMINENT DOMAIN IN THE 50 STATES (Am. Bar Ass'n 2010) (Kansas chapter); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL OF RTS. J. 679 (2005); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?"*, 4 ALB. GOV'T L. REV. 154 (2011); Randall A. Smith, *Eminent Domain After Kelo and Katrina*, 53 LA. BAR J. 363 (2006); ROBERT H. THOMAS, EMINENT DOMAIN: A HANDBOOK ON CONDEMNATION LAW (Am. Bar Ass'n

2011) (chapters on *Prelitigation Process*, *Flooding and Erosion*); Robert H. Thomas, *et al.*, *Of Woodchucks and Prune Yards: A View of Judicial Takings From the Trenches*, 35 VT. L. REV. 437 (2010).

OCA believes that its members' long experience in advocating for property owners and protecting their constitutional property rights will provide an additional, valuable viewpoint on the issues presented to the Court.

SUMMARY OF ARGUMENT

This case presents the court with an opportunity to bring a measure of long-absent clarity to one part of takings law. A physical invasion of property – even that which is deemed "temporary" – is a taking and triggers the Fifth Amendment's requirement to pay just compensation. Thus, the government cannot avoid liability for a taking when it floods property simply by asserting that it did not intend for the invasion to be permanent. Temporal metaphysics are less important than the actual permanent damage and deprivation of use inflicted by an invasion.

When property is damaged permanently, as were petitioner's trees, there is no principled distinction between a physical invasion that is permanent and compensable, and an invasion that is claimed to be temporary and is not. The Federal Circuit, however, concluded otherwise and drew artificial and unenforceable lines between "temporary" flooding and "permanent" invasions, with the only delineation

between them being the intent of government officials. This Court should reverse, and reaffirm the rule that *any* physical invasion of private property that results in a deprivation of the property owner's use requires the payment of just compensation.

This brief makes a single point: the Federal Circuit's *per se* rule of nonliability has it exactly backwards, and this Court should reaffirm the rule that all "direct and substantial" physical occupations, even if temporary, are takings. In those cases, the duration of the invasion is a factor in the calculation of just compensation, not whether a taking has occurred.

ARGUMENT

In an area of law in which the Court generally eschews bright-line rules, *see Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) ("The temptation to adopt what amount to *per se* rules in either direction must be resisted."), two categories of government actions nonetheless result in *per se* liability under the Takings Clause. First, a taking occurs when the effect of the government action is to deprive property of its economically beneficial uses. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Second, when the government has "compel[led] the property owner to suffer a physical 'invasion' of his property," the government must pay just compensation. *Id.* (citing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (imposition of navigational servitude on private

waterway was a taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1987) (requirement that property owner allow installation of small cable TV box a taking); *United States v. Causby*, 328 U.S. 256, 265 & n.10 (1946) (invasion of airspace)). *See also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (exaction of public access easement as a condition of development approvals is a taking). While recognizing that invasions assumed to be permanent do not require a case-specific inquiry into the public interest supporting the action and do not require a physically large intrusion, *see Lucas*, 505 U.S. at 1015 (permanent "minute" intrusions require compensation), this Court has never fixated on an artificial distinction between "permanent" and "temporary" invasions to determine liability, much less adopted the Federal Circuit's absolute rule that invasions deemed "permanent" are takings, while those deemed "temporary" are not. Instead, this Court has applied the rule that any direct and substantial occupation of private property is a taking, and requires compensation even if temporary.

Under this rule, only in unusual circumstances will physical invasions not be treated as takings. For example, in *Nat'l Bd. of YMCA v. United States*, 395 U.S. 85 (1969), this Court concluded that the government was not liable for a taking when rioters damaged a building after military troops temporarily occupied it. *Id.* at 92. The occupation was not planned and was extremely brief – the troops occupied the building for a single night – and the rioters inflicted the majority of the damage to the building prior to

the government occupation. Moreover, the troops did not actually interfere with the owner's use of the building, since it was already under siege by the rioters. *Id*. at 93. Consequently, the Court held that there was no taking because "the physical occupation by the troops did not deprive petitioners of any use of their buildings," and "the temporary, unplanned occupation of petitioners' buildings in the course of battle does not constitute direct and substantial enough government involvement to warrant compensation under the Fifth Amendment." *Id*.

The rule to be gleaned from *YMCA* is that government invasions that are "direct and substantial" interferences with property owners' right to exclude and deprive them of use of their property are takings and require compensation regardless of the duration of the invasion. In the case at bar, the flooding of petitioner's property and the resultant destruction of its trees certainly qualify under this standard. Thus, the mere facts that the flooding was not infinite, and that the government may not have intended to continue its conduct forever, are not dispositive, and are no bar to recovery.

Eminent domain law has never drawn a distinction between a temporary taking and a permanent taking for liability purposes; rather, the duration of the seizure is one of the factors to be considered when calculating just compensation. When condemning property, the government is not required to take an infinite fee simple absolute estate. Thus, the government is liable to pay compensation when it temporarily uses private property. *See*, *e.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

Compensation is also owed if the government abandons a taking voluntarily or otherwise, thus rendering it "temporary." *See First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). Similar rules should govern inverse condemnation actions, since takings law is premised on the idea that in certain instances, the government is obligated to pay compensation even if it has not invoked its eminent domain power. *Id.* at 316. ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."). Any questions identifying the duration of the occupation should be issues of compensation, not liability:

> The extent of impairment, like the duration of the intrusion, is not irrelevant. The greater the impairment, the more compensation required. If the owner's use of the property is not impaired at all, then maybe no compensation should be required. But that is not because the land was not taken. It is because justice may not require compensation for a taking that does not impair the owners use at all.

Alan Romero, *Takings by Floodwaters*, 76 N.D. L. REV. 785, 789 (2000). *See also United States v. Cress*, 243 U.S. 316, 328 (1917) ("so long as the damage is substantial, that determines the question [of] whether there is a taking").

For example, the Virginia Supreme Court recently concluded that a single instance of flooding can result in government liability for inverse condemnation. In *Livingston v. Virginia Dep't of Transportation*, No. 101006 (Va. June 7, 2012), the court held that a one-time flood could be a taking. The plaintiffs claimed that in building the Beltway in the 1960's, the Virginia Department of Transportation (VDOT) straightened and relocated a portion of Cameron Run, a stream feeding into the Potomac River. The plaintiffs also claimed that VDOT failed to maintain the relocated channel in the intervening years, and the latter failure resulted in their homes being flooded with sewage after a massive rainfall in 2006. The owners whose homes were flooded filed an inverse condemnation action in state court to recover just compensation under the Virginia Constitution, which requires compensation when private property is taken or damaged for public use. The trial court sustained VDOT's demurrer, concluding that a single instance of flooding could not result in inverse condemnation liability. The Virginia Supreme Court reversed:

> To the extent that the circuit court held that a single occurrence of flooding cannot support an inverse condemnation claim, it erred. We find nothing in Article I, Section 11's text or history that limits a property owner's right to just compensation for a damaging to only multiple occurrences of flooding. Further, our case law holds that a single occurrence of flooding can support an inverse

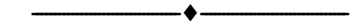
> condemnation claim. In *Hampton Roads Sanitation District v. McDonnell*, 234 Va. 235, 360 S.E.2d 841 (1987), we said that a property owner could bring a new inverse condemnation suit against the City of Hampton Roads each time it discharged sewage onto his property. *Id*. at 239, 360 S.E.2d at 844. We explained: "[T]he original discharge of sewage in 1969 did not produce all the damage to the property. The discharges were not continuous; instead, they occurred only at intervals. Thus, *each discharge inflicted a new injury for which [the property owner] had a separate cause of action*." *Id*. (emphasis added).

Livingston, slip op. at 11-12.

This same principle applies to the case at bar. There is no question that petitioner's trees have been permanently taken, and the fact that the damage was the result of multiple flood events means only that petitioner potentially had multiple causes of action, not that there was no taking at all. *Cf. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 332 (2002) (temporary moratorium on all use is not a taking because "property will recover value as soon as the prohibition is lifted"). Here, petitioner's trees have been permanently damaged, and cannot recover their value even if the government-caused flooding was merely temporary.

Finally, the government's intent to limit the duration of the flooding, even if it could be established by extrinsic evidence, is not relevant to a

determination of whether a physical invasion is a taking. The Federal Circuit's attempt to distinguish a taking from a tort contradicts this Court's decisions beginning with *Pumpelly v. Green Bay Co*., 80 U.S. 166 (1871), which hold that intent is not relevant to takings analysis. *Pumpelly* was also a flooding case, where the construction of a dam resulted in the plaintiff's property being inundated. The Court rejected the government's argument that it was not liable for a taking because the construction of the dam was a valid exercise of government power, and the damage caused by the flooding was merely a consequential result of that action. *Id*. at 177. Thus, it was the result of the government's valid exercise of power in damaging the plaintiff's property that mattered, not the government's intent (or, more accurately, its lack of intent) to take it. *Id*. at 177-78. The same reasoning applies to the claim that government's intent that its action is temporary or permanent is the controlling factor in determining whether a taking has occurred.



CONCLUSION

The judgment of the Federal Circuit should be reversed.

Respectfully submitted,

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