No. 11-597

IN THE
Supreme Court of the United States

ARKANSAS GAME & FISH COMMISSION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Federal Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When the Government adopts a policy that will foreseeable result in repeated physical invasions of private property by flood waters, but the policy is designated as temporary in nature, what test should be adopted in determining whether the policy results in a "taking" compensable under the Fifth Amendment?

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government.[1]

WLF has regularly appeared before this and other federal courts in cases involving claims arising under the Fifth Amendment's Takings Clause. *See, e.g., Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 525 U.S. 302 (2002); *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned that governments not be permitted to circumvent Takings Clause constraints by characterizing their challenged policies as temporary in nature. *Any* challenged policy can be characterized as temporary, in the sense that there is always the possibility that the policy will be lifted at some future date. *Amici* strongly believe that the approach adopted

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

by the court below – whereby a federal government water-release policy labeled "temporary" cannot give rise to a traditional Takings Clause analysis – is a recipe for emasculating the Takings Clause.

STATEMENT OF THE CASE

Every year between 1993 and 2000, the Army Corps of Engineers (the "Corps") adopted "planned deviations" from its normal schedule of water releases from the Clearwater Dam in southeast Missouri.[2] Those deviations entailed decreased water releases in the spring (when some farmers living downstream wanted reduced river levels during their planting season), and increased water releases during summer months. Petitioner Arkansas Game & Fish Commission (the "Commission") alleges that these deviations caused extended summer flooding of its wilderness area (located along the Black River, 115 miles downstream from the dam) – rendering its property unusable for months at a time and leading to the entirely foreseeable destruction of timber worth millions of dollars. The Corps persisted with the deviations despite repeated complaints from the Commission that the deviations were causing massive flooding damage. After the trees died, the Corps acknowledged the destructive effects of its deviations, abandoned plans to adopt the 1993-2000 release patterns as a permanent policy, and approved no more deviations.

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[2] The plan evidencing the Corps's normal schedule of water releases was adopted in 1953, soon after construction of the Clearwater Dam.

In 2005, the Commission filed suit against the United States (the "Government") under the Tucker Act, 28 U.S.C. § 1491, claiming that the 1993-2000 deviations and resultant floods constituted an uncompensated taking of its property in violation of the Fifth Amendment's Takings Clause. After, conducting a two-week trial, the Claims Court agreed and awarded the Commission nearly $5.8 million in compensation. Pet. App. 39a-161a.

The Claims Court held that the Commission, in order to prevail on its takings claim, was required to establish three factual elements by a preponderance of the evidence: (1) the Corps released water from the Clearwater Dam that "proximately and directly caused" the Commission's property (known as "the Management Area") to be flooded; (2) the flooding caused substantial damage to the property; and (3) the Government either intended to and did "take" the property, or it took actions "the natural consequence of which were to take" the property. *Id.* at 81a. The court concluded that the Commission introduced evidence sufficient to establish all three elements.

In particular, the Claims Court found that the Government intended to injure or invade the Management Area – based on a finding that "a reasonable investigation" would have revealed that the deviations would cause extended summer flooding of the Management Area and would damage the Commission's timber. *Id.* at 99a. The court concluded that the 1993-1999 deviations were the sole cause of the summer flooding in those years and were the sole cause of the substantial destruction of the Commission's timber in the years 1999 and 2000. *Id.* at 104a-128a.

The court held that intentional Government water releases that result in foreseeable flooding constitute the acquisition of a flowage easement across the flooded property. *Id.* at 85a. It stated that a compensation is warranted under the Fifth Amendment "where a landowner can demonstrate that government actions subjected his or her land to intermittent, frequent, and inevitably recurring flooding." *Id.* at 87a (citations omitted). The court concluded that the Commission met that standard, based on the court's findings that: (1) the deviations "regularly inundated portions of the Management Area during the growing season to an extent not experienced previously; and (2) because of the "sustained nature" of the water releases during the growing seasons, "the flood waters would stay on the affected portions of the Management Area for an extended period." *Id.* at 88-89. It further held that the Government's flood-inducing water releases were not mere "isolated invasions that might merely constitute a tort." *Id.* at 89a.

A divided U.S. Court of Appeals for the Federal Circuit reversed. Pet. App. 1a-37a. The appeals court concluded that it need not address the Government's contention that various of the trial court's factual findings (particularly its finding that the flooding and resultant timber damage were entirely foreseeable) constituted "clear error." Rather, it held that the Commission's takings claims were precluded as a matter of law "because the deviations were by their very nature temporary and, therefore, cannot be 'inevitably recurring' or constitute the taking of a flowage easement." *Id.* at 22a.

The appeals court held that "cases involving

flooding and flowage easements are different" from run-of-the-mine takings cases and are controlled by a distinct set of judicial precedents. *Id.* at 18a. The court said that government-induced flooding cannot constitute a taking unless it is a "permanent invasion of the land," and that an invasion cannot be deemed "permanent" unless there exists a "permanent condition of continual overflow" or "a permanent liability to intermittent but inevitably recurring overflows." *Id.* at 18a-19a (quoting *United States v. Cress*, 243 U.S. 316, 328 (1917). The court concluded that because the Corps's deviations were approved on an annual basis during the 1993-1999 period and were never intended to constitute a new, permanent water-release policy, the flooding of the Management Area could not, by definition, be deemed "inevitably recurring." *Id.* at 27a-28a (noting that "the deviations in question were plainly temporary and the Corps eventually reverted to the permanent plan").

Judge Newman dissented. Pet. App. 29a-37a. She would have held that "when the invasion [of private property through flooding] preempts the owner's right to enjoy his property for an extended period of time, the principles of constitutional deprivation of property apply," and that the "eventual abatement of the flooding does not defeat entitlement to just compensation." *Id.* at 33a (citations omitted).

In August 2011, the appeals court denied the Commission's petition for panel rehearing and rehearing *en banc*. Pet. App. 164a. Judge Newman wrote an opinion dissenting from the denial, as did Judge Moore (joined by Judges O'Malley and Reyna). *Id.* at 170a-179a. Judge Moore took issue with the

panel's statement that "unlike other types of takings, flooding due to government action must constitute a 'permanent invasion" in order for the landowner to recover." *Id.* at 172a. He stated, "I think the Court of Federal Claims properly analyzed the eight years of release rate deviations and the recurring flooding that these caused and determined that the character of this government action – this repeated, consistent flooding – constituted a taking." *Id.* at 175a-176a.

Judge Dyk, the author of the panel decision, wrote an opinion concurring in the denial of the petition for rehearing *en banc*. *Id.* at 165a-169a. He stated that the panel decision did not preclude courts from looking behind a Government assertion that its water-release policy was "temporary" in nature. *Id.* at 168a. If the Government attempts to hide behind a "temporary" label by, for example, labeling 50 "consecutive and identical one year deviations" as a "temporary" policy, a landowner could properly assert a takings claim by challenging the "temporary" nature of the policy, he explained. *Id.* at 169a. A takings claim is precluded, however, when (as here) the evidence demonstrated that the Government adopted no long-term plan to continue its deviations from the standard release policy, he stated. *Id.*

SUMMARY OF ARGUMENT

The Federal Circuit erred in concluding that flooding cases are exempt from the rules normally applicable to claims asserted under the Takings Clause. Under those rules, "Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires

compensation." *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). In such cases, compensation is required "no matter how minute the intrusion, and no matter how weighty the public purpose behind it." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). While a temporary physical occupation is obviously a more "minute . . . intrusion" than a permanent physical occupation, its temporary nature is not normally deemed a reason to deny compensation.

The Federal Circuit's decision to exempt flooding cases from normally applicable Takings Clause rules was based on a misreading of this Court's precedents. The Court stated in 1917 in *Cress* that flooding cannot form the basis for a takings claim unless it is either "permanent" or "inevitably recurring." 243 U.S. 316. The Federal Circuit apparently misinterpreted the phrase "inevitably recurring," interpreting it to mean "recurring for the indefinite future." To the contrary, the phrase merely requires the claimant to demonstrate that repeated flooding was the inevitable consequence of the government's actions and would continue so long as the government's action continued. When the Court has denied Takings Clause claims in flooding cases, it generally has done so because the claimant has failed to demonstrate that the government's policy was the actual cause of flooding, not because the policy was adopted on a temporary basis only or because the flooding did not continue indefinitely.

The concept of a government "taking" has traditionally been understood to include an element of volition; the Government generally is not deemed to have taken private property unless it intended to "take" the property or at least intended actions whose

foreseeable and natural consequences would be the "taking" of the property. *See, e.g.*, *Yee*, 503 U.S. at 522 (a taking occurs where the government "authorizes" a physical occupation of property). That volition requirement prevents the Government from being held liable to pay compensation every time a flood occurs in the vicinity of a Government dam. Thus, where a flood is more properly attributable to unexpectedly heavy rains rather than to dam construction, and for that reason its recurrence cannot be deemed "inevitable," no compensation is warranted. *Sanguinetti v. United States*, 264 U.S. 146 (1924). Once the volition requirement is satisfied, however, nothing in the Court's case law suggests that flooding cases should be treated differently from any other cases in which a property owner asserts a Takings Clause claim.

Where the repeated flooding of property is found to be the direct and foreseeable result of Government policy, the flooding can appropriately be deemed a "physical occupation" of the property by the Government. The Court has repeatedly stated that such physical occupation constitutes a *per se* taking that is always compensable, regardless whether the occupation is intended to be permanent or temporary. The Court has distinguished between permanent and temporary government policies only in the context of *regulatory* takings. *Tahoe-Sierra*, 535 U.S. at 323 (a permanent regulation that deprives a property owner of all value is a *per se* taking; but courts assessing a Takings Clause challenge to a regulation that only temporarily deprives a property owner of all value must undertake "complex factual assessments of the purposes and economic effects of government actions."). Accordingly, the Court should rule that the Commission's claims are subject to

a *per se* takings analysis.

The Government asserted in the Federal Circuit that several of the Court of Federal Claims's factual findings (particularly its findings regarding causation and foreseeability) constituted "clear error." The Federal Circuit did not address that assertion, but instead held that Takings Clause liability was precluded as a matter of law due to the temporary nature of the Government's deviations. Because the appeals court has not yet ruled on the Government's "clearly erroneous" argument, this Court should not address the argument in the first instance. *Amici* respectfully suggest that the Court reverse the appeals court's ruling that precluded Takings Clause compensation for "temporary" flooding. It should then remand the case to allow the appeals court to consider the Government's assertion that the trial court's judgment was based on clearly erroneous factual findings. The Federal Circuit should be instructed to affirm the trial court's judgment (on the basis of a *per se* takings theory) if it concludes that the challenged factual findings were not clearly erroneous.

ARGUMENT

I. FLOODING CASES ARE NOT EXEMPT FROM GENERALLY APPLICABLE TAKING CLAUSE PRINCIPLES, WHICH PERMIT COMPENSATION REGARDLESS WHETHER THE CHALLENGED POLICY IS PERMANENT

The Takings Clause of the Fifth Amendment provides, "[N]or shall private property be taken for public use, without just compensation." One of the principal purposes of the Takings Clause is "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).

The Court has repeatedly made clear that the Takings Clause is fully applicable *both* to government policies that take private property on a permanent basis *and* to government policies that do so on a temporary basis. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) ("'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation"); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable.").

Indeed, the Federal Circuit explicitly

acknowledged the validity of that principle as a general matter. Pet. App. 18a ("In general, if particular government action would constitute a taking when permanently continued, temporary action of the same nature may lead to a temporary takings claim."). The appeals court nonetheless concluded that "cases involving flooding and flowage easements are different" and that the constitutional protections normally afforded to landowners whose property is temporarily taken from them are inapplicable to temporary takings that result from government-induced flooding. *Id*. Deeming itself bound by its own precedent as well as precedent from this Court, the Federal Circuit held that flooding induced by a *temporary* government policy is not compensable because such flooding cannot be deemed to meet a prerequisite that it be "inevitably recurring." *Id*. at 21a. Because the Corps's 1993-1999 deviations were not implemented pursuant to a permanent water-release policy, the appeals court held that the Commission was categorically ineligible for compensation under the Takings Clause. *Id*. at 22a.

The Federal Circuit's decision to exempt flooding cases from normally applicable Takings Clause rules was based on a misreading of this Court's precedents and their reference to "inevitably recurring" flooding.

A. Floods Are Deemed "Inevitably Recurring" Whenever a Claimant Demonstrates That Repeated Flooding Was the Inevitable Consequence of the Government's Actions

The reference to "inevitably recurring" flooding originated with the Court's 1917 *Cress* decision. In that case, the Court *upheld* the takings claims of two property owners whose property was adversely affected by the construction of locks and dams along rivers in Kentucky. One of the property owners demonstrated at trial that, as a result of erection of the locks and dams, 6.6 acres of his property was "subject to frequent overflows of water from the river, so as to depreciate it one half of its value." 243 U.S. at 318. The Court rejected the Government's contention that no taking is effected when government-induced flooding deprives the property owner of only a portion (rather than all) of the property's value. *Id.* at 328. The Court explained that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines whether it is a taking." *Id.* Noting that it had ruled in two prior cases[3] that flooding of lands by "permanent" backwater created by dam construction is always compensable under the Takings Clause, the Court saw no reason to create a different rule when the dam causes flooding that would inevitably recur even if it does not create a continuous overflow: "There is no difference in kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but *inevitably recurring* overflows; and on principle, the right to compensation must arise in the one case as in the other." *Id.* (emphasis added).

We note initially that the issue of a temporary

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[3] *Pumpelly v. Green Bay & M. Canal Co.*, 80 U.S. 166 (1871); *United States v. Lynah*, 188 U.S. 445 (1903).

government policy was not at issue in *Cress* (*e.g.*, the Government had no plans to remove any of its locks and dams), and thus the Court had no occasion to consider whether property owners could obtain compensation for flooding caused by a temporary water-management policy. Accordingly, the Court's reference to "intermittent but inevitably recurring overflows" should not be read as passing judgment on the compensability of overflows that will recur but (due to the temporary nature of the government policy) will not necessary recur indefinitely.

Nonetheless, the rationale of *Cress* is strongly supportive of the Commission's position. *Cress* emphasized that courts should focus on the "character of the invasion," not its magnitude. *Id.* The Commission's situation is analogous to the plaintiff in *Cress*: the magnitude of its loss was tempered by the fact that the Corp's deviations were never adopted as a permanent policy and were eventually abandoned. But "the character of invasion" was similar to the invasions at issue in *Pumpelly* and *Lynah*: in each case, the property owner suffered substantial damage to the value of its property because of the government's intentional adoption of a challenged water management policy.

The Federal Circuit appears to have based its holding on a misunderstanding of *Cress*'s use of the phrase "inevitably recurring overflows." *See*, e.g., Pet. App. 21a (The condition leading to the 'intermittent, but inevitably recurring' flooding . . . must be permanent. Otherwise, it could not be 'inevitably recurring.'"). The appeals court appears to have interpreted the phrase as referring to events that will recur for all times. That is not the meaning of the word

"inevitable." An event is defined as "inevitable" if it is "incapable of being avoided or evaded." *Webster's New Collegiate Dictionary* (G. & C. Merriam Co. 1981). Thus, an event is "inevitably recurring" if recurrence of the event is "incapable of being avoided or evaded." Nothing about that phrase connotes recurrence on a permanent basis, or even the likelihood of recurrence on more than one occasion. The flooding of the Management Area that occurred in 1993 as a result of the Corps's deviations was "inevitably recurring" in the sense that the 1994-1999 flooding was entirely predictable based on the Corps's continuation of its deviations for a seven-year period.

The Court repeated its "inevitably recurring" language in several later flooding cases in which Takings Clause claims were raised. In none of those decisions did the Court suggest that government-induced flooding should not be deemed "inevitably recurring" (and thus ineligible for Takings Clause compensation) simply because the government's water-control policy was not permanent. *See, e.g.*, *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 810 n.8 (1950) (citing *Cress*'s "inevitably recurring" language and affirming award of compensation to landowner).

B. Although a Government "Taking" Requires an Element of Volition, the Claims Court Found That the Corps Adopted a Policy Whose Foreseeable Consequence Was Destructive Flooding of the Management Area

The concept of a government "taking" has

traditionally been understood to include an element of volition; the Government generally is not deemed to have taken private property unless it intended to "take" the property or at least intended actions whose foreseeable and natural consequences would be the "taking" of the property. *See, e.g., Yee*, 503 U.S. at 522 (a taking occurs where the government "authorizes" a physical occupation of property).

Thus, a potential Takings Clause claim does not arise simply because an individual claims that the Government is responsible for his property's depreciation in value. For example, if a nuclear power plant operated by a government-owned utility suffers an accidental meltdown and radiation leaks into the atmosphere, nearby property owners almost surely will suffer a substantial loss in property value. The radiation contamination would not normally be deemed a Fifth Amendment "taking," however, because the contamination was not the direct result of an authorized government policy. Rather, if the Government could be shown to have acted negligently, the landowners could likely maintain a cause of action under the Federal Tort Claims Act.

This principle – that a Takings Clause claim can be maintained only where the invasion of private property is foreseeably caused by an authorized government policy – is well illustrated by the Court's *Sanguinetti* decision. In that case, the Government had constructed a canal in Stockton, California, as well as a "diversion dam" immediately below the intake to the canal. Engineers determined that the canal was sufficient to carry away all expected waters, and thus they reasonably expected no flooding on the upland side

of the dam. 264 U.S. at 147. However, "a flood of unprecedented severity" caused an overflow onto the Petitioner's property, and he sought compensation under the Takings Clause. The Court rejected the claim, finding that the flooding was neither foreseeable by the Government nor shown to have been caused by the Government's construction of a canal and dam:

> Prior to the construction of the canal the land had been subject to the same periodical overflow. If the amount or severity thereof was increased by reason of the canal, the extent of the increase is purely conjectural. Appellant was not ousted, now was his customary use of the land prevented, unless for short periods of time. If there was any permanent impairment of value, the extent of it does not appear. It was not shown that the overflow was the direct and necessary result of the structure; nor that it was within the contemplation of or reasonably to be anticipated by the government.

Sanguinetti, 264 U.S. at 149-150.

It is true, of course, that issues of foreseeability and causation may be more complex in a flooding case than in other sorts of cases that regularly arise under the Takings Clause. That is so because in flooding cases it is water, not government employees, that invade the landowner's property; foreseeability and causation will generally not be disputed by the Government when its own employees enter and take possession of the

property pursuant to a government policy.[4] Once the volition requirement is satisfied, however – that is, once the court determines that the Government intended to flood the property or to take actions whose natural and foreseeable consequences included the flooding – nothing in the Court's case law suggests that flooding cases should be treated differently from any other cases in which a property owner asserts a takings claim.

The Court of Federal Claims issued detailed factual findings regarding foreseeability and causation. It found that the Government intended to injure or invade the Management Area – based on a finding that "a reasonable investigation" would have revealed that the deviations would cause extended summer flooding of the Management Area and would damage the Commission's timber. Pet. App. at 99a. The court also found that the 1993-1999 deviations were the sole cause of the summer flooding in those years and were the sole cause of the substantial destruction of the Commission's timber in the years 1999 and 2000. *Id.* at 104a-128a. Indeed, while some flooding would have occurred if the Corp had adhered to its 1953 water-release plan or if the

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[4] *Amici* note that the Court has regularly recognized Takings Clause claims in cases in which the property invasion occurs pursuant to a Government policy but it is not the Government itself that undertakes the invasion. *See*, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Takings Clause violation found where city required property owner to permit pedestrians and bicyclists to traverse her property; *Brown,* 538 U.S. at 235 (State of Washington required that interest earned on trust accounts be transferred to a private foundation dedicated to providing legal services for the indigent); *Causby v. United States*, 328 U.S. 254 (1946) (federal government established airport that caused private planes to invade the airspace of adjacent property owners.

Clearwater Dam had never been built, the Court concluded that the destruction of timber would not have occurred under any of those alternative factual scenarios. *Id.* The Federal Circuit did not question any of those factual findings. Pet. App. 22a. Given those findings, the Federal Circuit erred in concluding that this case is not governed by this Court's standards governing temporary takings.

C. The Federal Circuit Erred by Establishing a Rule Barring All Flooding Claims Based on Temporary Government Policy

In its brief opposing the petition for a writ of certiorari, the Government asserts that the Federal Circuit did not, in fact, establish a blanket policy that bars all Takings Clause claims based on an assertion that flooding was caused by a temporary government policy. U.S. Opp. Cert. 14-15. That assertion is without merit.

In an opinion concurring in the denial of the petition for rehearing *en banc*, Judge Dyk (the author of the panel decision) sought to elaborate on the panel's views regarding temporary takings claims. He explained that a Takings Clause claimant complaining of government-induced flooding could prevail by demonstrating that the challenged government policy was really a permanent policy even though the Government called it a temporary policy. Pet. App. 168a-169a. But that statement does nothing to change the blanket nature of the Federal Circuit's bar on claims based on a less-than-permanent water-release policy.

The concurring opinion makes clear that a Takings Claim is absolutely barred when (as here) the evidence demonstrates that the Government has adopted no long-term plan to continue the challenged water-release policy. As explained above, the Federal Circuit's categorical bar on temporary takings claims is inconsistent with established case law.

II. TEMPORARY TAKINGS ARE SUBJECT TO PER SE ANALYSIS WHEN, AS HERE, THERE IS A PHYSICAL INVASION OF THE PROPERTY

Where the repeated flooding of property is found to be the direct and foreseeable result of Government policy, the flooding can appropriately be deemed a "physical occupation" of the property by the Government. In its flooding cases, the Court has repeatedly referred to Government-induced flooding of the property as an "invasion." *See, e.g., Cress*, 243 U.S. at 328. Such physical occupations are generally deemed to constitutes a *per se* taking that is *always* compensable, regardless whether the occupation is intended to be permanent or temporary.

For example, the Court explained in *Tahoe-Sierra*:

> When the government physically take possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, *United States v. Pewee Coal Co.*, 341 U.S. 113, 115 (1951). Thus, compensation is mandated when a leasehold is

> taken and the government occupies the property for its own purposes, *even though that use is temporary*. *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946).

Tahoe-Sierra, 535 U.S. at 322 (emphasis added).

At issue in *Tahoe-Sierra* was whether that same *per se* takings analysis should apply to temporary regulatory takings – that is, government regulations that *temporarily* deprive a landowner of the all value of his property. The Court had previously ruled that government regulations that permanently deprive a landowner of all economic value of his property, even though they do not entail any government intrusion under the property, are subject to a *per se* takings analysis. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *Tahoe-Sierra* held that *per se* analysis should not be applied to temporary regulatory takings. Rather, the Court held, temporary regulatory takings claims should be judged under the multi-factor balancing test set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

In making that determination, the Court went to great pains to distinguish regulatory takings cases from those in which the government has physically occupied the landowner's property. For example, it explained:

> For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings

> context to regulatory takings claims. Land use regulations are ubiquitous and most of them impact property values in some tangential way – often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.

Tahoe-Sierra, 535 U.S. at 323-24.

The Court's statement that "we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use," is further confirmation that *Tahoe-Sierra* mandates use of *per se* takings analysis in all cases involving a "physical appropriation" – regardless whether the appropriation is temporary or permanent. An examination of whether a government policy "advances a substantial government interest" and whether it "deprives the owner of all economically valuable use" are, of course, two of the hallmarks of a *Penn Central* takings analysis. Stating that such analysis is never appropriate when the government has appropriated property is another way of saying that *per se* takings analysis is mandated. *See also Brown*, 538 U.S. at 235 (*per se* taking analysis is applicable to state program that temporarily appropriates private funds of private individuals in order to generate interest for use by legal services groups).

Moreover, *per se* takings analysis applies to cases

involving physical invasions, regardless how small the damages or how brief the invasion. As the Court has explained, the extent of the invasion is largely irrelevant, because "[t]he Fifth Amendment draws no distinction between grand larceny and petty theft." *Hodel v. Irving*, 481 U.S. 704, 727 (1987) (Stevens, J., concurring). Of course, the six-to-seven years of physical invasions that occurred here would, in any event, preclude any assertion that this case involves only isolated flooding.

In sum, the Commission's claim that the Government physically invaded the Management Area with its flood waters is subject to *per se* takings analysis. If the Claims Court's principal factual findings (foreseeability and causation) are not clear error, a *per se* analysis requires that the Commission is entitled to compensation for all its losses.

The Government asserts that Court of Federal Claims's causation and foreseeability findings were, in fact, clearly erroneous. The Federal Circuit did not address that assertion, however, but instead held that Takings Clause liability was precluded as a matter of law due to the temporary nature of the Government's deviations. Because the appeals court has not yet ruled on the Government's "clearly erroneous" argument, this Court should not address the argument in the first instance. The Court recently explained:

> [W]hen we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error preventing them from addressing. *See, e.g., Bond v. United States*, 131 S. Ct. 2355, 2359 (2011) (reversing the Court of

> Appeals' determination on standing and remanding because the "merits of petitioner's challenge to the statute's validity are to be considered, in the first instance, by the Court of Appeals.").

Zivotofsky v. Clinton, 132 S. Ct. 1421, 1430-31 (2012).

Amici respectfully suggest that the Court reverse the appeals court's ruling that precluded Takings Clause compensation for "temporary" flooding. It should then remand the case to allow the appeals court to consider the Government's assertion that the trial court's judgment was based on clearly erroneous factual findings. The Federal Circuit should be instructed to affirm the trial court's judgment (on the basis of a *per se* takings theory) if it concludes that the challenged factual findings were not clearly erroneous.

CONCLUSION

Amici curiae request that the Court reverse the decision of the court of appeals.

Respectfully submitted,

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