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No. 11-597

In The
Supreme Court of the United States

ARKANSAS GAME &
FISH COMMISSION,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, NATIONAL ASSOCIATION OF HOME BUILDERS, AMERICAN FARM BUREAU FEDERATION, AMERICAN FOREST RESOURCE COUNCIL, AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does a temporary physical invasion and occupation of private property give rise to a categorical duty to compensate for damages caused to the property?

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INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37, the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center), the National Association of Home Builders (NAHB), the American Farm Bureau Federation (Farm Bureau), American Forest Resource Council (AFRC), and the Center for Constitutional Jurisprudence (CCJ) submit this brief amicus curiae in support of Petitioner Arkansas Game & Fish Commission.

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents over 300,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from

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[1] Counsels of record have consented to the filing of this brief. Letters evidencing Petitioner's consent have been filed with the Clerk of Court, and Respondent has filed a blanket consent. In accordance with Rule 37.6, NFIB Legal Center, NAHB, Farm Bureau, AFRC, and CCJ state that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The Legal Center files in this case because many small businesses own land, and lack the financial resources to absorb substantial devaluation, or destruction, of their properties. As such, small business owners are particularly interested in the physical takings doctrine, and in ensuring that this Court offers predictable and workable rules to guide the lower courts in the takings inquiry.

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 130,000 members are home builders or remodelers, and its builder members are responsible for about 80 percent of all housing constructed each year in the United States.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant

and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated. NAHB has participated before this Court as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by inequitable treatment under a wide array of statutes and regulatory programs. NAHB's policies have long advocated that the Taking Clause must be given the same respect as all other constitutional rights. Essential to this is that government must pay just compensation if it physically invades a person's property.

The Farm Bureau is a voluntary general farm organization established in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. The Farm Bureau has member organizations in 50 states and Puerto Rico, representing more than 6.2 million member families. It has regularly participated as *amicus curiae* in this Court in cases involving the interpretation of the Takings Clause of the Fifth Amendment to the Constitution. The Farm Bureau's members own or lease substantial amounts of land, on which they depend for their livelihoods and on which all Americans depend for the supply of high quality, affordable food, fiber, and other basic necessities. Because their land may be subject to flooding, in order to relieve pressures on upstream dams and levees, farmers have great interest in ensuring that they can seek just compensation when their farmlands and soils are damaged or destroyed by government induced flood-invasions.

AFRC is an Oregon nonprofit corporation that represents the forest products industry throughout Oregon, Washington, Idaho, Montana, and California. AFRC represents over 50 forest product businesses and forest landowners. AFRC's mission is to create a favorable operating climate for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, and policies regarding management of forest lands. AFRC members have a great interest in ensuring that their forest lands are not taken without just compensation, and they have asserted their property rights in takings cases involving government regulation of forest land for spotted owls.

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, the mission of which is to restore the principles if the American Founding to their rightful and preeminent authority in our national life, including the proposition expressed in the Fifth Amendment that private property can be taken only for public use, and then only upon payment of just compensation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Kelo v. New London*, 545 U.S. 469 (2005), and *Rapanos v. United States*, 547 U.S. 715 (2006).

SUMMARY OF ARGUMENT

Petitioner, Arkansas Game & Fish Commission (Commission), seeks just compensation for damage caused by Respondent's, United States Army Corps of Engineers (Army Corps), calculated decision to deviate from longstanding policies that governed the volume and length of water-releases from the Clearwater Dam in southeast Missouri. These deviations resulted in eight years of recurrent flood invasions, which ultimately destroyed numerous trees on the Commission's downstream property. For the following reasons this Court should recognize that Army Corps physically invaded the Commission's property, requiring just compensation under the Fifth Amendment.

Government assumes a categorical duty to pay just compensation for any physical invasion of private property, regardless of how long the ensuing occupation persists. *Per se* liability arises at the time of the initial invasion because—in rejecting the parcel as a whole rule—the physical takings doctrine holds that the physical occupation of any temporal segment of real property constitutes a burden for which just compensation is owed. Thus the length of the physical occupation is irrelevant to the question of whether a taking occurred. The length of the occupation matters only with regard to the amount of compensation owed.

Finally, Amici NFIB Legal Center, NAHB, Farm Bureau and AFRC argue that a taking is apparent here, even under the basic principles of fairness and justice outlined in *Armstrong v. United*

States, 364 U.S. 40 (1960); however, amici caution this Court against adopting a balancing test here because such tests have proven unworkable in the past. A balancing test would place both government actors and landowners in the precarious position of having to guess as to how a court might weigh competing factors. In the absence of bright line rules, government actors and landowners will have little guidance as to when a physical takings claim will ripen. This places property owners in a particularly unenviable position because government attorneys will almost invariably argue that a temporary physical takings claim has been brought either too early or too late.

I. GOVERNMENT ASSUMES A CATEGORICAL DUTY TO PAY JUST COMPENSATION WHENEVER IT INVADES PRIVATE PROPERTY, REGARDLESS OF WHETHER THE ENSUING OCCUPATION IS SHORT-LIVED

a. The Physical Takings Doctrine Requires Compensation for Temporary Occupations

In 1871 this Court first recognized that any "serious interruption to the common and necessary use of property…" will be equivalent to a taking, requiring compensation under the Constitution. *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 179-180 (1871); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 528 (2005) ("The paradigmatic taking requiring just compensation is a direct government appropriation

or physical invasion of private property.").[2] That principle has been unquestionably applied to hold government liable for any permanent invasion of private property. *United States v. Cress*, 243 U.S. 316, 327-328 (1917) (recognizing that existing precedent made clear that government assumes takings liability in creating a condition which results in permanent recurring floods); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-426 (1982). A more vexing question has occasionally arisen as to whether temporary occupations give rise to takings liability as well. *Loretto*, 458 U.S. at 432 (questioning, in *dicta*, when a temporary takings claim may be consummated).[3] However, this Court has repeatedly affirmed the validity of temporary takings claims. *See Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (just compensation owed when United States temporarily commandeered a laundry facility); *International Paper v. United States*, 282 U.S. 399 (1931) (requisition order allowing third parties to draw all

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[2] *United States v. Clarke*, 445 U.S. 253, 257 (1980) (the public duty to pay just compensation is self-executing).

[3] Despite *Loretto's* suggestion that temporary physical takings claims may be reviewed under a balancing test, that was not the *ratio decidendi* of the decision because it was not essential to its analysis in concluding that the permanent physical invasion was a *per se* taking in that case. *See* Dennis H. Long, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportunity for New Directions in Takings Law*, 72 Ind. L.J. 1185, 1194 (1997) ("This statement is at least partially dicta since *Loretto* was decided as a per se permanent physical taking."); s*ee Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 303 (2002) (Explaining that it is "inappropriate to treat" physical invasion cases as binding in regulatory takings cases).

of a river's flow constituted a temporary taking); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946) (temporary taking recognized where government occupied leaseholds); *United States v. Dickinson*, 346 U.S. 389 (1953) (government was required to pay just compensation for flooding property, despite the fact the occupation was rendered temporary when the landowner managed to reclaim most of the submerged land). Indeed, our modern physical takings doctrine was borne in *United States v. Causby*, 328 U.S. 256, 259 (1946), a case in which takings liability was recognized for interference with property rights caused by—*temporary*—recurrent low–altitude flights over private property, which resulted in the loss of livestock.[4]

Although *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924), created a degree of confusion in suggesting that an invasion must be permanent for takings liability to arise, subsequent cases have roundly rejected a temporal requirement in the physical takings doctrine.[5] *United States v. General Motors Corp.*, 323 U.S. 373, 382-384 (1945). The idea that an invasion must be permanent, or

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[4] "As a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright. The total chickens lost in that manner was about 150."

[5] *Sanguinetti* misstated the proper rule, but this was *dicta* because the decision was ultimately resolved on the ground that there was no way to determine to what extent the federal public works project contributed to, or caused, the flooding of *Sanguinetti's* property. *Sanguinetti*, 264 U.S. at 149-150. To the extent that *Sanguinetti* has any applicability here, it is with regard to the requirement that Game & Fish must demonstrate that Army Corps' water release policies caused the damage to its property.

permanently-recurrent, to constitute a taking, can be traced back to a passing comment—also *dicta*—in *Cress*, 243 U.S. at 327-328. There the Court considered whether government assumed liability for a public works project that created a *permanent condition* causing recurrent intermittent flooding.[6] The Court noted in its analysis that "the findings… render[ed] it plain that this [was] not a case of temporary flooding or of consequential injury, but a permanent condition, resulting from the erection of [a] lock and dam, by which the land [was] 'subject to frequent overflows of water from the river.'" *Cress*, 243 U.S. at 327-328. The clear implication was that a different—perhaps more difficult—question would have been presented if government had caused only temporary flooding; however, later cases unquestionably provide that takings liability arises even from short-lived occupations. *See First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 331-332 (1987) (Justice Stevens dissenting) ("The cases that the [majority] relies upon for the proposition that there is no distinction between temporary and permanent [regulatory] takings are inapposite, for they all deal with physical takings… None of those cases is controversial; the state certainly may not occupy an

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[6] "On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase-however fortuitously coined." *Lingle*, 544 U.S. at 528. This appears to be the case here because *Sanguinetti* drew from this language, inferring a rule from *dicta*. *See Sanguinetti*, 246 U.S. 146, 149. Even the Federal Circuit—in this case—cites *Cress* for the proposition that a taking must be permanent or must result in a permanent condition causing recurrent floods. *Arkansas Game & Fish Com'n v. U.S.*, 648 F.3d 1377, 1379 (Fed. Cir., 2011)

individual's home for a month and then escape compensation by leaving and declaring the occupation 'temporary.'"). That rule was again reaffirmed in *Tahoe-Sierra*, 535 U.S. at 322 (citing *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Petty Motor Co.*, 327 U.S. 372 (1946)) (internal citations omitted).

b. Government has a Categorical Duty to Pay Just Compensation for the Physical Occupation of Any Segment of Real Property

i. The Physical Takings Doctrine Employs *Per Se* Rules in Rejecting the Parcel as a Whole Balancing Inquiry

Tahoe-Sierra explains that an estate in property entails both spatial and temporal dimensions. *Tahoe-Sierra*, 535 U.S. at 318 (citing Restatement of Property §§ 7–9 (1936)). Thus a property may be segmented in nearly infinite ways. A parcel of land can be physically divided into acres, or even down to square inches, and an estate, in any spatial segment of real property can be further divided into separate temporal terms. For example, an owner can theoretically divide his property into separate physical units, renting each out for a term of years, months, hours or even minutes.[7] In this

[7] Short-term leases are commonplace. Mary Jane Angelo ET AL., *Small, Slow and Local: Essays on Building a More Sustainable and Local Food System*, 12 Vt. J. Envtl L. 353, 395 (2011) (Noting that "Americans presently rely on two

fashion, smaller estates may be incrementally carved from a larger estate. *See* Steven H. Gifts, Law Dictionary: Barron's Educational Series, 271 (3rd. Ed. 1991) ("A lease creates an estate in real property…"). Thus the physical takings doctrine recognizes takings liability when government acts to take any such estate, regardless of how narrow the interest taken may be when viewed either spatially or temporally.[8] *See Causby*, 328 U.S. at 265 (recognizing the duty to pay compensation even where government invades only an easement); *see e.g.*, *Loretto*, 458 U.S. at 436 (occupation of only a few inches constituted a taking); *see also General Motors*, 323 U.S. at 378 (recognizing government had taken an "estate in years").

This is necessarily the case because the physical takings doctrine unequivocally rejects the "parcel as a whole rule," and instead employs only the categorical rule that just compensation must be paid for what is taken. *Tahoe-Sierra*, 535 U.S. at 322 ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.") (Internal citations omitted); s*ee also Loretto*, 458 U.S. at 436 (rejecting the idea that a

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predominant forms of land tenure: full ownership (fee simple)… and short-term lease agreements…").

[8] Where government invades a property it is interrupting exclusive private ownership, and the private estate is therein encumbered to the extent of the invasion. Thus for example, a temporary occupation of a property held in fee simple absolute will sever the owner's estate into something less than a fee simple. *General Motors Corp.*, 323 U.S. at 378.

physical occupation must burden a requisite portion of real property before takings liability arises). Whereas the regulatory takings doctrine looks to the "parcel as a whole" in weighing whether a regulatory burden amounts to a taking, the physical takings doctrine rejects that approach in lieu of *per se* rules. *Tahoe-Sierra*, 535 U.S. at 303. In this regard the physical and regulatory takings doctrines stand in marked contrast. *Tahoe-Sierra* recognized this distinction as crucial in grappling with the question of when a temporary government action constitutes a taking.

In *Tahoe-Sierra* this Court considered whether a 32-month regulatory moratorium on construction amounted to a *per se* taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The property owners argued that the *Lucas per se* test should apply because they had been completely deprived of the right to make any economic use of their property during the moratorium. The Court rejected that argument, and explained that the regulatory takings test looks to the impact of a restriction on the parcel as a whole, so as to prevent property owners from expediently "defining the property interest taken in terms of the very regulation being challenged." *Tahoe-Sierra*, 535 U.S. at 331. As such, the Court held that it is inappropriate to look at only a limited temporal segment of a property when considering whether a *regulation* has deprived the property owner of all economically beneficial uses. *Id.* at 303. For that reason, temporary regulatory takings claims are relegated to review under the balancing test set

forth in *Penn Central Transp. Co. v. New York City*, 483 U.S. 104 (1978).

Conversely, there is no basis for resorting to a balancing test when a temporal segment of property has been physically occupied. A balancing analysis is necessary in the context of a regulatory takings case because the actual impact of an abstract regulatory restriction can only be understood in view of what uses are allowed over the course of a property's full life. By contrast, in physical takings cases the extent of the invasion and the actual burden imposed are concrete and readily apparent; therefore, there is no need to balance the economic impact of a physical occupation against the value retained by the parcel as a whole. *Tahoe-Sierra*, 535 U.S. at 324. Moreover, without employing the parcel as a whole rule, there is simply no basis for saying that a physical occupation must be of a requisite magnitude—in terms of either space or time—to trigger the duty to pay just compensation. Accordingly, categorical liability necessarily arises even with temporary physical invasions.[9]

[9] In practice a property owner would only bring a takings claim where the government has caused substantial enough damages to justify the costs of litigation. The daunting costs associated with bringing an inverse condemnation claim would discourage most potential litigants from seeking compensation for fleeting invasions. Furthermore, government would only be liable for damages caused to the property resulting from the temporary occupation.

ii. There is No Constitutional Basis for Excluding Temporary Physical Takings From the *Per Se* Rule

The Takings Clause provides that, "[P]rivate property [shall not] be taken for public use, without just compensation." CONST. Amend. V. Nothing in the text suggests a constitutional rubric for delineating how long an occupation must persist before it should be recognized as a taking. Yet, for that matter, nothing in the text indicates how much space must be occupied for a taking to be recognized either. *Loretto*, 458 U.S. at 436 ("Constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied."). In the absence of any constitutional grounding for a test weighing whether a physical occupation controls a substantial enough portion of a property to constitute a taking, *Loretto* explained that there is no conceptual basis for establishing a requisite threshold. *Id.* (The *per se* rule "avoids otherwise difficult line-drawing problems."). For the same reason, this Court should likewise refuse to establish a minimum temporal threshold here because there is no principled way to draw the line. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) ("[L]aw pronounced by courts must be principled, rational, and based upon reasoned distinctions.").

The Takings Clause was adopted to protect what the American Founders viewed as the natural rights to use and enjoy property "as embedded in the common law…" Edwin Meese III, The Heritage

Guide to the Constitution, 342 (David F. Forte, Sr. Ed., Mathew Spalding, Ex. Ed., Regnery Publishing, Inc., 2005). Thus *Loretto* held that the permanent occupation of any spatial segment of real property is subject to categorical protection under the Takings Clause because "the right to exclude emerged from the ancient protection against trespass." *Id.* at 343. But, the common law does not protect property owners against only *permanent occupations*; liability for trespass arises even for *fleeting invasions*.[10] Therefore, there is no more constitutional basis for imposing a minimum temporal requirement on physical takings claims than there is for imposing minimum spatial requirements. *See Petty Motor Co.*, 327 U.S. at 375 (summarily concluding that temporary occupation amounted to a taking); *see also* W. Blackstone, Commentaries; J. Lewis, Law of Eminent Domain in the United States 197 (1888) ("Any invasion of property… whether temporary or permanent, is a taking…") (footnote omitted).

[10] At common law, the length of the invasion matters only in determining what damages are owed. Joseph F. Falcone III and Daniel Utain, *You Can Teach an Old Dog New Tricks: The Application of Common Law in Present Day Environmental Disputes*, 11 Vill. Envtl. L.J. 59, 110 (2000) ("Traditionally, under a common law nuisance or trespass action… temporary or abatable harms were remedied by the cost of repair to the land, whereas permanent harms considered the diminution in value to the property.").

iii. There is No Constitutional Basis for Denying Just Compensation by Appealing to Tort Concepts

Nor is there any constitutional basis for immunizing government actors from taking liability for temporary physical invasions on the theory that fleeting invasions are more properly characterized as torts than as takings. As this Court noted in *Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 730 (1999), uncompensated takings are coextensive with—not exclusive from—tortious government action.[11] But, this area of the law has been confused by an unnecessary infusion of tort concepts in the lower courts. Arvo Van Alystene, *Inverse Condemnation: Unintended Physical Damage*, 20 Hastings L.J. 431, 431 (1969) (Noting "divergent approaches" and systemic confusion, as courts grapple with "a complex web of doctrinal threads" in assessing whether physical damage gives rise to takings liability, or merely a claim in tort).

The Federal Circuit has—to some extent—contributed to this confusion by developing a threshold test to supposedly distinguish "potential physical takings from possible torts." *Ridgeline Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003). This focus on the distinction between tort and takings claims tends to distract reviewing courts from the ultimate issue of whether a taking has been

[11] "Nor… is the tort nature of the cause of action, and its entitlement to jury trial, altered by the fact that another cause of action was available (an inverse-condemnation suit) to obtain the same relief."

consummated.[12] Yet on serious examination, the *Ridgeline* test actually goes to the merits of the takings claim. *Ridgeline* first requires a showing that the owner has suffered a property loss resulting from an intentional invasion or from the "'direct, natural, or probable result of an authorized activity...'" *Ridge Line*, 346 F.3d at 1355 (internal citations omitted). Second the owner must demonstrate that a legally protected property interest has been appropriated. *Id.* But, this is merely a restatement of the elements of any physical takings claim: the property owner must demonstrate that he or she has (1) lost a cognizable property interest, (2) as a direct result of a government induced invasion. Steven Eagle, Regulatory Takings, Sec. 7-5 (3rd ed. 2005).

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[12] It would be inappropriate to appeal to tort concepts such as "negligence" and "reasonableness" in review of a takings claim because a taking is measured only in terms of the burden imposed on the property. Subjective considerations of negligence and reasonableness are impertinent to the question of whether a property has been burdened with an easement. *See Causby v. United States*, 328 U.S. at 266 (An easement is taken when there is a "direct" invasion interfering with the use and enjoyment of the property). Such considerations would be wholly irrelevant in a permanent flooding case, and it is difficult to imagine why they should be any more relevant if the occupation is only short-lived. After all, government's intent—or lack of intent—neither diminishes nor magnifies the severity of the burden suffered by the property owner. *See Lingle*, 544 U.S. at 529 (rejecting the "substantial advancement test" because it "reveals nothing about the *magnitude or character of the burden*" imposed) (emphasis in the original).

II. ARMY CORPS CONSUMMATED A TAKING WITH THE INVASION AND TEMPORARY OCCUPATION OF THE COMMISSION'S PROPERTY

a. Army Corps Assumed a Categorical Duty to Pay Just Compensation in Taking Away the Right to Exclude During its Flood-Invasion

Our takings jurisprudence has always recognized the right to exclude as the "fundamental element of the property right…" *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991) ("In the bundle or rights we call property, one of the most valued is the right to sole and exclusive possession-the right to exclude strangers, or for that matter friends, but especially the Government."). Accordingly, if the right to exclude is taken, "property" has effectively been taken. *Kaiser Aetna*, 444 U.S. at 179-80. Therefore, evidence that the Army Corps directly caused a flood-invasion is dispositive of the takings inquiry. *General Motors*, 323 U.S. at 378. A taking is evident because the right to exclude was necessarily taken away with the initiation of the flood-invasion.

The fact that the Army Corps eventually ceased its invasive activities does not change the reality that the right to exclude was taken. The Commission lost the rights of exclusive possession and dominion over its land throughout the duration of the recurring invasions. During this time, the Commission's estate in the property was

encumbered by a unilaterally asserted dominant servitude. Therefore, the Army Corps took a narrow interest in the Commission's property. *See U.S. v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627 (1961) ("It is indisputable… that a flowage easement is 'property' within the meaning of the Fifth Amendment."). [13] The only remaining question is how to value the interest taken? *Id.* at 630 ("The valuation of an easement upon the basis of its destructive impact upon other uses of the servient fee is a universally accepted method of determining its worth.").

b. A Taking Must Also be Recognized Under *Armstrong* by Virtue of the Fact the Commission's Property was Destroyed

During any physical invasion the fundamental right of exclusion is taken away for the time the occupation persists. But where the invasion causes destruction, that injury is coupled with injuries to other rights. Notwithstanding the—often devastating—impact that a temporary physical invasion may cause in destroying a home, place of

[13] A flowage easement allows the easement holder to divert water over a servient property. The government may attain a flowage easement either through a formal condemnation proceeding in eminent domain, or informally by effecting a flood-invasion. *United States v. Dickinson*, 331 U.S. 745, 747-748 (1947) ("The Government could… have taken appropriate proceedings, to condemn as early as it chose, both land and flowage easements. By such proceedings it could have fixed the time when the property was 'taken.' The Government chose not to do so. It left the taking to physical events…"); *Causby*, 328 U.S. at 267 ("[A]n accurate description of the property taken is essential, since that interest vests in the United States.").

business or other valuable resources, the Federal Circuit's decision below holds that property owners are without protection under the Fifth Amendment in these cases. *See e.g.*, *Big Oak Farms v. United States*, 2012 WL 1570878, 4 (Fed. Cl.) (2012) (dismissing a takings claim for a temporary flood-invasion that "damaged plaintiff's land, crops, equipment, and infrastructure"). This simply cannot be squared with the bedrock principle of our takings jurisprudence that a property owner should not be forced to bear alone "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); *Lingle*, 544 U.S. at 529.[14] Nor can these decisions be squared with the categorical rule that a taking is consummated with the physical invasion of any segment of real property.

Here, the Army Corps argues that a temporary physical taking must be recurrent and must last longer than eight years; however, this analysis has no place in existing takings case law. *Lingle* 544 U.S. at 538 (recognizing only one physical takings test). There is no reason why the frequency or length of an occupation should matter to the takings inquiry, except to the extent that it may be assumed that the burden imposed upon the property owner becomes more significant the longer an occupation persists. But, if the imposition of an unjust burden is the true mark of a taking, then a

[14] It should be noted that government is presumed to act in the public interest when effecting policy decisions, public works projects, and other government functions. Therefore property destroyed or damaged as a result of legitimately initiated government action has been appropriated for the purpose of advancing the public good. *See General Motors*, 323 U.S. at 378.

takings claim cannot be disposed of simply because the invasion was fleeting or non-recurrent.

Here the essential rights to use, possess and dispose of the Commission's property were completely annihilated with the destruction of its trees.[15] *Loretto*, 458 U.S. at 435 (indicating that a taking occurs when the government action may be said to "chop through the bundle [of property rights], taking a slice of every strand."); *General Motors Corporation*, 323 U.S. at 378 ("destruction is tantamount to taking…"). Indeed, an owner cannot reasonably use property that has been destroyed or severely damaged. Nor can the owner meaningfully possess a property at that point.[16] Finally, even the

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[15] Even under *Loretto's* suggested balancing approach a taking is evident where—as in this case—property is damaged or destroyed. *Loretto* suggested that the burden of a temporary invasion must be weighed in consideration of the actual impact it has on the owner's rights to use, possess and dispose of the property in question. *Loretto*, 458 U.S. at 435 (citing a temporary taking case). Yet there is no need to resort to an *ad hoc* balancing approach; a taking is readily apparent here because the Commission lost all of its rights with regard to the portion of its property destroyed by the Army Corps water-release policies.

[16] If property has been entirely destroyed then the right to possess has been completely taken away. But, even where the property remains in existence, the owner has lost the right of meaningful possession if it can longer be used. Moreover, in the case of homes, or other structures, severe damage will generally raise health and safety issues, which would render them uninhabitable or otherwise in violation zoning codes, or other state and local laws. *See e.g.,* City of Northglenn Zoning Code, Section 10-15-6(g)(Subsection 403(1) ("Any building declared a dangerous building under this Code shall be made to comply with one of the following… [t]he building shall be repaired, rehabilitated or remediated in accordance with the

meaningful right to dispose of a property is taken away when government destroys the property and or its value. J. Gregory Sidak, *A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet*, 2 J. Competition L. & Econ. 349, 377 (2006) ("The right to dispose of property includes the right to sell, lease, or otherwise subdivide the use of the property over space, time, and any other feasibly defined dimension."); *Lucas*, 505 U.S. at 1017, 112 S.Ct. 2886 ("[F]or what is the land but the profits thereof[?]") (*quoting* 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812)). Those rights are *permanently* taken away with regard to the segment of property that has been damaged or destroyed.

Moreover, a taking must be recognized whenever property is destroyed because such an imposition is necessarily more burdensome than the paradigmatic taking recognized in *Loretto*. It would be entirely illogical to say that the permanent placement of a simple cable imposes a greater burden on a property owner than the burden suffered by another who has lost a home, a business, or other valuable resources as a result of a temporary invasion. It does not matter how fleeting the invasion might be when the essential rights to meaningfully use, possess and dispose of physically damaged structures and resources have been *permanently* impaired. Indeed,

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current building code, health code, resolution or standards, or other current code applicable… [or] the building shall be demolished at the option of the building owner… [or] if the building does not constitute an immediate danger to life, limb, property or safety of the public it may be vacated, secured and maintained against entry."); *see also Oswalt v. Ramsey County*, 371 N.W.2d 241, 247 (Minn.App.,1985) (Addressing a zoning code that prohibited repair of damaged property).

if the permanent placement of a cable imposes a burden requiring just compensation "in all fairness and justice," then—*a fortiori*—the permanent destruction of the building upon which the cable is attached requires just compensation all the more. Accordingly, the destruction of the Commission's trees should be compensated in all fairness and justice.

III. A BRIGHT–LINE RULE SHOULD APPLY BECAUSE A BALANCING TEST WOULD CREATE TREMENDOUS UNCERTAINTY AS TO WHEN A TAKINGS CLAIM SHOULD BE BROUGHT

This Court should eschew any *ad hoc* balancing approach in favor of a definitive *per se* rule recognizing that a taking is consummated at the time there is a physical invasion of private property. Balancing tests have proven entirely unworkable under this Court's regulatory takings doctrine, and for that reason should be avoided here where a bright-line is concrete and easily discerned. *See* R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Making Sense of Penn Central*, 36 Ecology L.Q. 731, 735 (2011) (observing that the *Penn Central* balancing test remains shrouded in a "formless, directionless haze," and noting the near invariable calls for further guidance from courts and commentators). Indeed, in the 32 years since *Penn Central* relegated (most) regulatory takings claims to its multi-factor balancing test, that area of takings jurisprudence has become a veritable jungle of contradictory opinions. *See* John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. Envtl. L.

& Pol'y 171, 175 (2005) (arguing that the *Penn Central* balancing test serves as nothing more than "legal decoration for judicial rulings based on intuition…"). *Penn Central* and its progeny have remained rudderless and commentators invariably agree that neither property owners nor government regulators have any way of rationally assessing takings liabilities under that regime. Steven J. Eagle, *Some Permanent Problems With the Supreme Court's Temporary Regulatory Takings Jurisprudence*, 25 U. Haw. L. Rev. 325, 352 (2003) ("[E]mphasis on balancing tests gives… no one much predictability."). If the Court were to endorse an *ad hoc* balancing test for temporary physical takings cases, the same would be true here as well.

Without a bright-line rule, regulators would have little guidance as to when physical takings liability would arise. Likewise property owners would have to guess as to how a court would balance competing factors if they should bring a claim. "The need for greater uniformity, consistency, and predictability is particularly pressing in the physical damage cases, for they comprise the single most significant class of inverse condemnation claims, whether measured numerically or in terms of the magnitude of potential liabilities." Van Alstyne, *supra* at 432.

Yet aggrieved property owners would be in a particularly unenviable position if a balancing test governs. If the owner has already suffered catastrophic losses he or she may not be in a position to continue waiting to be sure that an inverse condemnation claim has ripened. Moreover, it is

foreseeable that zealous government attorneys will invariably argue that the suit has been brought too soon. *See* William M. Hof, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After Palazzolo v. Rhode Island*, 46 St. L. Univ. L. J. 833, 833-835 (2002) (noting that property owners seeking to ripen a regulatory takings claim are often caught in a seemingly endless procedural merry-go-round). Still the same attorneys would predictably argue that a landowner has waited too long to initiate an inverse condemnation claim if the physical occupation has already persisted for any substantial length of time, provided that the statute of limitations defense could reasonably be raised. *See e.g., CRV Enterprises, Inc. v. United States*, 626 F.3d 1241 (Fed. Cir. 2010) (when the property owner advanced a takings claim in 2003 the United States argued that the claim was unripe, but subsequently argued that the claim was barred by the statute of limitations when it was reinitiated in 2006).

CONCLUSION

This Court should reverse the Federal Circuit and hold that Respondent took a temporary flowage easement over Petitioner's property.

Respectfully submitted,

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