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 OF WOLFSEN LAND & CATTLE CO., et al., AS AMICI CURIAE IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Early takings cases involved taking by flooding, and the holdings used terms such as "inevitably recurring" or "permanent," but without analysis. Modern takings cases hold that temporary takings claims can arise in the context of physical takings. But the Federal Circuit ignored recent takings decisions, holding that the six–year flooding of the Petitioner's land was not a taking because it was not "inevitably recurring" or "permanent." Should the Federal Circuit be reversed?

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The Wolfsen Land and Cattle Company, Turner Island Farms, Inc., West Turner Island Ranch, Lone Willow Ranch, Don C. and Lynn W. Skinner, Lawrence Scott Skinner, Thomas Clay Skinner, Laurel Lynn Skinner, Stacie L. Skinner–Hanson, Lawrence John Wolfsen, Mew Ventures, LP, Robert H. Mueller, Joanne Mueller, and various other Wolfsen, Skinner, and Mueller family–related companies, as amici curiae, respectfully submit that the decision of the Federal Circuit Court of Appeals should be reversed.

Interests of Amici Curiae

Amici curiae (collectively "Wolfsen amici") own approximately 12,973 acres of valuable and productive farm land located in the San Joaquin River basin in California's Central Valley.[1]

The Wolfsen amici currently face having their prime agricultural land, buildings, and crops repeatedly flooded and their crops and buildings

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[1] In accordance with this Court's Rule 37.6, the Wolfsen amici state that no counsel for a party authored this brief in whole or in part, and no party provided any funds for the preparation and submission of this brief. Both parties have consented to the filing of this brief.

destroyed over a number of years due to Congress's passage of the San Joaquin River Restoration Settlement Act, Pub. L. 111-11, 123 Stat. 991 (2009), and implementation of that statute by the United States Bureau of Reclamation.

The San Joaquin River is the main artery of California's second-largest river system. The river is also an important part of the Central Valley Project, the largest federal water management project in the United States. As part of the Central Valley Project, the United States Bureau of Reclamation operates the Friant Dam, built and designed in the 1940s to store most of the San Joaquin River's flow, diverting that water to irrigate more than a million acres of farmland, including farmland owned by Wolfsen amici.

Since 2009, Reclamation has operated the Friant Dam to meet the requirements of the San Joaquin River Restoration Settlement Act, Pub. L. 111-11, 123 Stat. 991. That statute, which is intended to reintroduce salmon stocks that have been absent from the river for more than sixty years, requires interim releases of water for initial experimentation, as well as later permanent releases from Friant Dam. Dry for more than half a century, the channel of the San Joaquin is choked with vegetation and soil. Having lost much of its capacity to transport water, the river channel easily overflows onto adjacent lands, including Wolfsen amicis' farmlands, damaging their lands and crops. The same is true for many of their farming neighbors up and down the original river channel.

These interim releases of water, which will occur sporadically over the next several years as the Government attempts to find the best way of assisting the salmon to migrate up and down the 123–mile length of the San Joaquin River, arguably do not meet the "permanent" or "inevitably recurring" standard set out by the Federal Circuit in this case and applying this decision as the law of the circuit may well deny the Wolfsen amici any compensation for the taking of their property by this temporary but intentional flooding of their land and crops.

Wolfsen amici thus have a direct interest in ensuring that their property rights and the rights of other agricultural landowners be protected against Government destruction and invasion by flooding without payment of just compensation as the Fifth Amendment requires. As current decisions such as *First English Evangelical Lutheran Church v. Los Angeles County*[2] of this Court confirm, for the Fifth Amendment to remain meaningful, all takings of private property—even the taking of temporary flowage easements by flooding—if they result in the

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[2] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304 (1987).

destruction of private property and the ouster of the owner of that property for any significant period of time, require payment of just compensation.

Statement

1. In a 2-1 split decision, the Federal Circuit held that the Arkansas Game & Fish Commission was not entitled to just compensation for the United States's repeated and intentional flooding of its woodlands over a period of six years. The issue in the case was whether a flowage easement was taken, within the meaning of the Fifth Amendment, by the Army Corps of Engineers's periodic, temporary flooding of a state-owned Wildlife Management Area.

In determining that no taking had occurred, the Federal Circuit penned a decision that could well have been written 150 years ago. Relying on early decisions written when takings law was in its infancy, the Federal Circuit ruled that the six years of recurring flooding that destroyed valuable hardwood timber was not sufficiently "permanent" or "inevitably recurring" to constitute a taking.

That the decision echoes early takings cases is not, in and of itself, the problem. Rather, the

problem is that the Federal Circuit has continued to apply these early holdings in cases that also happen to involve the takings of flowage easements by flooding as if takings law had not evolved. In short, although takings law has moved beyond the early takings cases involving flooding, venerable cases such as *Pumpelly*,[3] *Cress*,[4] and *Dickinson*,[5] takings law in the Federal Circuit has not likewise evolved—when the taking involves flooding.

As a result, the Federal Circuit analyzed the taking of a flowage easement in this case under a test that uniquely applies to flooding cases. As such, the Federal Circuit's flooding takings test is entirely out of sync with modern takings jurisprudence, including this Court's rulings in cases such as *First English Evangelical Lutheran Church v. Los Angeles County*.[6] The Federal Circuit's flooding takings test also fails to explain why a six–year period of flooding was not cognizable as a permanent taking or as a temporary taking.

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[3] *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166 (1871).
[4] *United States v. Cress*, 243 U.S. 316 (1917).
[5] *United States v. Dickinson*, 331 U.S. 745 (1947).
[6] *First English Evangelical Lutheran Church of Glendale*, 482 U.S. 304 (1987).

In *Hendler v. United States*,[7] a case involving the EPA's installation of underground monitoring wells on privately owned land for a period of years, the Federal Circuit explained that "permanent" in the context of a physical occupation can mean a taking of a finite number of years:

> In this context, "permanent" does not mean forever, or anything like it. A taking can be for a limited term—what is "taken" is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the indefinite term of an estate in fee simple absolute. *See generally* Cribbet, *Principles of the Law of Property* 54 (3d ed. 1989).[8]

The *Hendler* court also described temporary trespasses as transient, and inconsequential. So described, the taking for the six years of flooding that occurred here is not a temporary trespass. In addition, the six years of flooding permanently transformed the habitat and destroyed valuable hardwood timber:

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[7] *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).
[8] *Hendler*, 952 F.2d at 1376.

> If the term "temporary" has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupance that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass *quare clausum fregit*. Our truckdriver parking on someone's vacant land to eat lunch is an example. . . . When the governmental intrusion is as substantial a physical occupancy of private property as this is, *Loretto* establishes that there is a taking.[9]

2. In this case, the U.S. Army Corps of Engineers built the Clearwater Lake and Dam in Missouri in the 1940s to control flooding on the Black River. Since 1948, the Corps has controlled releases of water from the Lake and Dam. In 1953, the Corps set forth in a Clearwater Lake Control Manual its guidelines for releasing stored water. In this case, although the Corps may have described its changes to the 1953 Clearwater Lake Control as "deviations,"

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[9] *Hendler*, 952 F.2d at 1377.

there was no deadline set for when the Corps would no longer be deviating from its 1953 Manual. The deviations, in short, were begun with an indefinite duration intended.

Had the Petitioner not complained to the Corps, presumably the Corps would have continued its deviations. That the Corps stopped prior to the filing of this lawsuit does not change the fact that the original releases were launched with no definite termination point identified.

3. The trial court held that "the inundations during growing seasons from 1993 through 1999 were recurrent and constituted an appropriation, albeit a temporary rather than permanent one because the Corps terminated its deviations."[10] The temporary flowage easement in turn caused a permanent taking of the timber. The trial court held the Federal Government liable for a temporary taking of a flowage easement over land and permanent taking of timber, awarding damages of $5.7 million.

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[10] *Arkansas Game & Fish Comm'n v. United States*, 87 Fed. Cl. 594, 619–620 (2009).

Focusing only on the flowage easement, a divided panel reversed the trial court's decision, holding that the flooding did not rise to the level of a taking because the flooding was not permanent or inevitably recurring.[11] This conclusion was bolstered by the Corps's description of its changes to the 1953 Lake Control Manual as "deviations."

But the dissenting judge disagreed, pointing out that the temporary flooding must be a temporary taking. The dissent further contended that the damage to the timber is permanent, thus a complete reversal was not warranted.[12]

This debate continued in the opinions denying rehearing and rehearing en banc. A 7-4 majority of the Federal Circuit judges denied rehearing,[13] with three judges agreeing that there was no taking because "[t]he United States Army Corps of Engineers ("Corps") made a series of ad hoc and independent decisions to deviate from the normal release rates at a dam in Missouri, which sometimes

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[11] *Arkansas Game & Fish Comm'n v. United States*, 637 F.3d 1366 (Fed. Cir. 2011), *cert. granted*, 132 S. Ct. 1856 (U.S. 2012).
[12] *Arkansas Game & Fish Comm'n*, 637 F.3d at 1379–1383.
[13] *Arkansas Game & Fish Comm'n v. United States*, 648 F.3d 1377 (Fed. Cir. 2011).

caused intermittent flooding on the plaintiff's property."

But the dissenting judges focused instead on the nature of the Corps's actions, not just how the Corps described its actions:

> An early Supreme Court decision, *United States v. Cress*, 243 U.S. 316, 328 (1916), handed down well before the development of the concept of 'temporary takings' as it is understood today, talked in terms of requiring that for flooding to constitute a taking, it must be "inevitably recurring." But that does not preclude the possibility that a government action labeled "temporary" could give rise to such "inevitably recurring" flooding. To allow the government's "temporary" label for the release rate deviations to control the disposition of this case elevates form over substance and leads to untenable results with enormous future consequences.[14]

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[14] *Arkansas Game & Fish Comm'n*, 648 F.3d at 1380–1381 (parallel citation omitted).

Summary of Argument

Over the years, this Court has rendered decisions in a number of significant takings cases involving flooding, including the first inverse condemnation takings case ever decided by the Supreme Court. In 1871, the Court held in *Pumpelly v. Green Bay & Mississippi Canal Co.*[15] that the State of Wisconsin must pay just compensation, under the Wisconsin just compensation clause, for the resulting "overflow" of water on privately owned land caused by the construction of a dam. In *Pumpelly*, the flooding was permanent, "the overflow remained continuously from the completion of the dam,"[16] so that there was "an almost complete destruction of the value of the land."[17]

In the following decades, the Court continued to render takings decisions in flooding cases, and the term "permanent" was repeated in decisions without any further analysis. In *United States v. Cress*,[18] the Court added the notion of "inevitably recurring" to the taking, stating that "[t]here is no difference of

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[15] *Pumpelly*, 80 U.S. 166.
[16] *Id.* at 177.
[17] *Id.*
[18] *Cress*, 243 U.S. 316.

kind, but only degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows . . . ."[19] And in *United States v. Dickinson*,[20] the Court found the taking of a flowage easement "taken by the United States to flood permanently land belonging to [plaintiffs]" without any discussion of the role that "permanent" played in the analysis.[21]

The Federal Circuit has continued to quote from these decisions, without stopping to ask if the use of the term "permanent" or "inevitably recurring" are simply artifacts. So, when the Federal Circuit rendered its decision in this case—stating its rule that these floods were not a taking—it did so without ever explaining how many floods are required before a flowage easement has been taken.

Modern takings cases decided by this Court suggest that repeated references to "permanent" and "inevitably recurring" in the flooding decisions may not be justified. Specifically, although not in the context of flooding, in *First English Evangelical Lutheran Church v. County of Los Angeles*, this

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[19] *Id.* at 328.
[20] *Dickinson*, 331 U.S. 745.
[21] *Dickinson*, at 747.

Court held that a temporary regulatory taking requires payment of just compensation.[22] More recently, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[23] the Court allowed the government some breathing room or "normal delays" in land–use decision making, but nevertheless stood firmly behind the notion of temporary takings.

So it is against this backdrop that now, 141 years after *Pumpelly* was decided, the Arkansas Game & Fish Commission has asked the Supreme Court to decide if the federal government must pay just compensation for flooding of state–owned land resulting from releases of water from the Clearwater Lake and Dam for six consecutive years. The question, at bottom, is whether this Court will carve out a special exception in takings law applicable only to taking by flooding, or will the Court fold flooding cases into the overall modern takings framework.

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[22] *First English Evangelical Lutheran Church of Glendale*, 482 U.S. 304 (1987).
[23] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

Argument

Under the Federal Circuit's decision in this case, the physical taking of a flowage easement by flooding for a period of years stands alone under the Fifth Amendment. According to the Federal Circuit, the Government can flood, destroy, and oust the owner of land from his or her property for as many years as it wants—so long as the Government is careful to describe its actions as "deviations" or even more devilish—"temporary." Sanctioning power to invade private property—with no constitutional restraints whatsoever imposed—so long as the Government decisionmaker is careful in how he or she describes its actions is precisely the result the framers of our Constitution hoped to avoid by including the Just Compensation Clause in the Constitution. A flood—even inevitably recurring in the eyes of the Federal Circuit—should not be able to escape constitutional scrutiny simply because inevitably recurring floods occur only temporarily.

I. The Fifth Amendment requires compensation for all takings—and does not distinguish between permanent and temporary takings

This Court has repeatedly recognized that the Fifth Amendment requires just compensation for temporary takings just as it does for permanent takings. In the leading case on this issue, *First English Evangelical Church v. Los Angeles County*,[24] this Court reversed the California Supreme Court and held that where the ordinance "denied appellant all use of its property for a considerable period of years . . . invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy."[25] And in *First English* this Court also held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[26]

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[24] *First English Evangelical Lutheran Church of Glendale*, 482 U.S. 304 (1987).
[25] *Id.* at 321–322.
[26] *Id.* at 321.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, this Court stated:

> 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, *United States v. Pewee Coal Co.,* 341 U.S. 114, 115 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. 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).[27]

Likewise, in *United States v. General Motors Corporation*[28] this Court stated that "[t]he right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the

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[27] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. at 322 (parallel citations omitted).
[28] *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945).

actual use, needs, or collateral arrangements of the occupier, has a value."[29] And in *United States v. Dow*,[30] this Court ruled that:

> [W]henever the Government enters into possession of property without filing a declaration of taking and without otherwise providing compensation for acquisition of the title . . . compensation would be measured by the principles normally governing the taking of a right to use property temporarily. *See Kimball Laundry Co. v. United States*, 338 U.S. 1; *United States v. Petty Motor Co.*, 327 U.S. 372; *United States v. General Motors Corp.*, 323 U.S. 373.[31]

Finally, in *United States v. Pewee Coal*,[32] this Court again ruled that "[h]aving taken Pewee's property, the United States became liable under the Constitution to pay just compensation. Ordinarily, fair compensation for a temporary possession of a

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[29] *Gen. Motors Corp.*, 323 U.S. at 380.
[30] *United States v. Dow*, 357 U.S. 17 (1958).
[31] *Id.* at 26 (parallel citations omitted).
[32] *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951).

business enterprise is the reasonable value of the property's use."[33]

In fact, the United States government routinely condemns and pays for flowage easements, including temporary flowage easements, as the following cases illustrate:

- In *United States v. Virginia Electric & Power Co.*,[34] "the Government acquired by condemnation a flowage easement over 1840 acres of fast lands adjacent to the Dan River, a navigable tributary of the Roanoke," and this Court was asked to review the compensation award.[35]

- In *United States v. 79.93 Acres of Land in Breckinridge and Meade Counties, Kentucky*,[36] the Government "filed condemnation suits for certain permanent and temporary flowage easements over two tracts

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[33] *Pewee Coal Co.*, 341 U.S. at 117.
[34] *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1961).
[35] *Virginia Elec. & Power Co.*, 365 U.S. at 624–625.
[36] *United States v. 79.39 Acres of Land in Breckinridge & Meade Counties, Ky.*, 440 F.2d 1190 (6th Cir. 1971).

of farmland owned by defendants-appellants . . . ."[37]

- In *United States v. 91.90 Acres of Land, Situate in Monroe County, Missouri*,[38] "[t]he government condemned a little more than 87 acres of the land in fee, and it also imposed permanent flowage easements with respect to two ravines; those easements affected 4.9 acres of land."[39]

- In *United States v. 21.54 Acres of Land, More or Less, in Marshall County, State of West Virginia*,[40] "[b]y means of . . . declarations, the United States acquired flowage easements necessitated by the harbor and river

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[37] *79.39 Acres of Land in Breckinridge & Meade Counties, Ky.*, 440 F.2d at 1190.
[38] *United States v. 91.90 Acres of Land, Situate in Monroe County, Mo.*, 586 F.2d 79 (8th Cir. 1978).
[39] *91.90 Acres of Land, Situate in Monroe County, Mo.*, 586 F.2d at 82.
[40] *United States v. 21.54 Acres of Land, More or Less, in Marshall County, State of W. Va.*, 491 F.2d 301 (4th Cir. 1973).

> improvement project known as the Hannibal Locks and Dam Project on the Ohio River."[41]

II. The use in early flooding cases of "permanent" and "inevitably recurring" was fortuitous and did not announce a doctrine of takings law

The Federal Circuit's conclusion that a flowage easement must be permanent—that there can be no just compensation for the taking of a temporary flowage easement—rests on a few fortuitously coined words from the early days of inverse condemnation law. As this Court explained in *Lingle v. Chevron*,[42] "[o]n occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined."[43] As the *Lingle* Court further stated:

> Twenty-five years ago, the Court posited that a regulation of private property "effects a taking if [it] does not substantially advance [a]

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[41] *21.54 Acres of Land, More or Less, in Marshall County, State of W. Va.*, 491 F.2d at 303.
[42] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).
[43] *Lingle*, 544 U.S. at 531.

> legitimate state interes[t]." The lower courts in this case took that statement to its logical conclusion, and in so doing, revealed its imprecision. Today we correct course.[44]

Here, as this Court ruled in *Lingle*, the time has come for this Court to correct course by clarifying a Fifth Amendment constitutional principle: That just compensation is due for the taking of temporary flowage easements, just as it is for the temporary taking of other property interests.

The origin of the "permanent" language is found in *Pumpelly v. Green Bay & Mississippi Canal Co.*, the first inverse condemnation case decided by this Court.[45] In that case, Wisconsin authorized the construction of a dam that resulted in the plaintiff's land being flooded, resulting in the loss of all value of that land:

> The declaration states that, by reason of the dam, the water of the lake was so raised as to cause it to overflow all his land, and that the overflow

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[44] *Lingle*, 544 U.S. at 548.
[45] *Pumpelly*, 80 U.S. 166.

> remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit in the year 1867, and the nature of the injuries set out in the declaration are such as show that it worked an almost complete destruction of the value of the land.[46]

In *Pumpelly*, there was no dispute that the land was permanently flooded, only whether Wisconsin was required to pay just compensation. So as this Court correctly held, Wisconsin had taken the full value of the land by flooding, and was required to pay for that full value under Wisconsin's just compensation clause:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as

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[46] *Id.* at 177.

> placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.[47]

The only issue decided in *Pumpelly* was whether the permanent flooding of property can result in an uncompensated taking—not whether a temporary flooding can also result in an uncompensated taking.

In *United States v. Cress*[48] this Court used the fortuitous "inevitably recurring" phrase, and again did so without analysis. There, the federal government built two dams on the Cumberland and Kentucky rivers, causing "frequent overflows of

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[47] *Id.* at 177–178.
[48] *Cress*, 243 U.S. 316.

water from the river" over part of the plaintiffs' property. The Court, citing *Pumpelly*, held that the frequent overflows had taken Cress's property even though they had not completely destroyed the value of the property: "There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows . . . ." [49]

In *Cress*, there was no discussion of how "permanent" or "inevitably recurring" the flooding needed to be in order for the Court to find an uncompensated taking. The Court simply found that the alleged overflows had taken the plaintiff's property.

In subsequent cases this Court continued to cite *Pumpelly* and *Cress*, quoting the "permanent" and "inevitably recurring" language, but without engaging in any analysis of that language. For example, in *Northern Transportation Company v. City of Chicago*,[50] seven years after *Pumpelly* was decided the Court denied an inverse condemnation claim by property owners who had been denied

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[49] *Cress*, 243 U.S. at 328.
[50] *N. Transp. Co. v. City of Chicago*, 99 U.S. 635 (1878).

access to their property during construction of a tunnel. Discussing *Pumpelly* (and a Supreme Court of New Hampshire case), the Court held that the interference of the plaintiffs' use of their property was not enough to work an uncompensated taking:

> In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiffs' lot. All that was done was to render for a time its use more inconvenient.[51]

Likewise, in *United States v. Lynah*,[52] this Court again cited *Pumpelly's* "permanent injury" language in holding that the flooding of a rice farm as a result of Government-built dams on the Savannah River was a taking of private property for public use, again without engaging in any discussion

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[51] *N. Transp. Co.*, 99 U.S. at 642.
[52] *United States v. Lynah*, 188 U.S. 445 (1903).

of how permanent the flooding must be to invoke the Fifth Amendment:

> It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the government has undertaken. Does this amount to a taking? The case of *Pumpelly v. Green Bay & M. Canal Co.* answers this question in the affirmative.[53]

Finally, in *United States v. Sponenbarger*,[54] this Court cited *Pumpelly* and *Cress*, noting that there were takings in those cases, but no taking where there was no flood: "While this Court has found a taking when the Government directly subjected land to permanent intermittent floods to an owner's damage, it has never held that the Government takes an owner's land by a flood program that does little injury in comparison with far greater benefits conferred."[55]

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[53] *Lynah*, 188 U.S. at 469.
[54] *United States v. Sponenbarger*, 308 U.S. 256 (1939).
[55] *Sponenbarger*, 308 U.S. at 267 (footnote omimtted).

III. The Fifth Amendment requires just compensation for the government's taking of a flowage easement, whether temporary or permanent

Because the Federal Circuit's holding in this case contradicts the vast body of constitutional law holding that the government must pay for a temporary taking just as for a permanent taking, this Court should reverse. As a recent commentator states, the Fifth Amendment does not distinguish between temporary and permanent takings:

> Whether a taking is characterized as temporary or permanent is of little significance in determining whether a taking has occurred and it is not conclusive on the issue of when a suit must be brought on a taking claim, but such characterization has a bearing on the measure of damages. When governmental action deprives a landowner of the use of his land for a temporary period of time, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period.
>
> When a taking of property is temporary in nature, an owner is entitled to compensation under the

> same principles as permanent takings of property, whether the temporary taking is physical or regulatory in nature. A temporary taking differs from a permanent taking in two key respects. First, once the period of the taking expires, the owner's legal interest and possession of the property is reestablished. Second, the taking is for a definite period of time.[56]

The touchstone for the determination of whether a government action gives rise to a claim for just compensation under the Fifth Amendment is thus not whether the taking is temporary or permanent, but whether the government action requires the property owner alone to shoulder the burden of providing a benefit for the public: "The Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[57]

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[56] KURTIS A. KEMPER, ELEMENTS AND MEASURE OF COMPENSATION IN EMINENT DOMAIN PROCEEDING FOR TEMPORARY TAKING OF PROPERTY, 49 A.L.R.6th 205, § 2 (2009)

[57] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Physical invasions like flooding (whether temporary or permanent) are paradigmatic takings because, as the Federal Circuit itself has stated, they take the owner's right to exclude (especially to exclude the government), which is a fundamental characteristic of private property:

> In the bundle of 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.
>
> The notion of exclusive ownership as a property right is fundamental to our theory of social organization.
>
> . . .
>
> The intruder who enters clothed in the robes of authority in broad daylight commits no less an invasion of these rights than if he sneaks in the night wearing a burglar's mask. In some ways, entry by the authorities is more to be feared, since the citizen's right to

> defend against the intrusion may seem less clear. Courts should leave no doubt as to whose side the law stands upon.[58]

In a very real sense, the difference between so–called "permanent" and so–called "temporary" takings of easements is merely a difference in duration—and certainly not a distinction of constitutional significance. As the Federal Circuit itself stated:

> In this context, "permanent" does not mean forever, or anything like it. A taking can be for a limited term—what is "taken" is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the indefinite term of an estate in fee simple absolute. *See generally* Cribbet, *Principles of the Law of Property* 54 (3d ed. 1989).[59]

Finally, the Fifth Amendment's guarantee of just compensation when private property is taken for

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[58] *Hendler*, 952 F.2d at 1374, 1375.

[59] *Hendler*, 952 F.2d at 1376.

public use cannot be defeated because government action is a "deviation" from prior practice. For the right to just compensation has never been dependent on what the government says it is doing, but rather on what government actually does:

> When [the Government] takes the property, that is, the fee, the lease, whatever [the owner] may own, terminating altogether his interest, under the established law it must pay him for what is taken.[60]

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[60] *Gen. Motors Corp.*, 323 U.S. at 382.

CONCLUSION

The decision of the Federal Circuit should be reversed.

Respectfully submitted,

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

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for writ of certiorari in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in Century 12 point for the text and 10 point for the footnotes, and this brief contains 5,296 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

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