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 United States Court Of Appeals For The Federal Circuit

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

SECONDARY SOURCES

International Municipal Lawyers Association, International City/County Management Association, National Association of Counties, National League of Cities, and U.S. Conference of Mayors respectfully submit this brief *amicus curiae* in support of Respondent.[1]

INTERESTS OF *AMICI CURIAE*

The International Municipal Lawyers Association, an advocate and resource for local government lawyers since 1935, serves as an international clearinghouse for legal information and cooperation on municipal legal matters for its 3000 members. The International City/County Management Association is a nonprofit professional and educational organization of over 9000 appointed chief executives and assistants serving cities, counties, towns, and regional entities; its mission is to create excellence in local government by advocating and developing the professional management of local governments throughout the world. The National Association of Counties, the only national organization that represents county governments in the United States, provides essential services to the nation's 3068 counties through advocacy, education and research. The National League of Cities, the country's largest and oldest organization serving municipal

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae*, make a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all the parties.

government, represents more than 19,000 U.S. cities and towns; its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. The U.S. Conference of Mayors, founded in 1932, is the official nonpartisan organization of all U.S. cities with populations of more than 30,000.

Amici curiae have a particular interest in this case because the Petitioner and its *amici curiae* ask the Court to jettison longstanding limits on the scope of physical takings doctrine and thereby expand the scope of the Takings Clause, which would subject local governments to major new financial burdens and impede their ability to perform essential public functions.

This proposed expansion of local government liability under the Takings Clause comes at a particularly inopportune time. In the aftermath of the Great Recession, "increasing numbers of local governments are encountering fiscal stress," both because of their own fiscal problems and because the States are passing the consequences of their fiscal problems down to the local level. Richard Ravitch & Paul A. Volcker, Report of the State Budget Crisis Task Force, Summary Report 18 (July 2012), available at http://www.statebudgetcrisis.org. As a result of these fiscal problems, local governments have laid off hundreds of thousands of workers over the last several years, undermining local governments' abilities to serve their citizens' needs and impeding a national economic recovery. *See* Sheila Dewain & Motoko Rich, *Public Workers Face Rash of Layoffs, Hurting Recovery*, N.Y. Times 1 (June 19, 2012).

INTRODUCTION AND SUMMARY OF ARGUMENT

While this case raises some general questions about takings law, it involves an unusual set of circumstances presenting these questions in an unusual light.

This case is a rare but not unprecedented example of one government suing another government under the Takings Clause. But Petitioner's governmental character is beside the point for the purpose of resolving the issues in the case. Petitioner claims a taking based on alleged incremental inundation of a floodplain and seeks compensation for damage to commercial timber. Thus, the case would be exactly the same if this lawsuit had been brought by, for example, a private timber investment firm.[2]

Second the case involves a claim against the United States whereas, for the reasons to be discussed, this type of claim is more likely to arise from state and local government action. The federal government's liabilities under the Takings Clause, to the extent the U.S. has waived its sovereign immunity, are paid from the permanent, unlimited Judgment

[2] Petitioner describes at length the environmental values protected by the Black River Wildlife Management Area, but this claim does not arise from or relate to any injury to those values. Therefore, they are irrelevant to the resolution of this case.

Fund. *See* 31 U.S.C. § 1304. By contrast, local governments are directly liable for their takings liabilities and can only secure and afford limited insurance against such liabilities. Thus, a ruling in favor of Petitioner in this case would actually be far more disruptive of the operations of state and local governments than those of the United States.

Finally, it is noteworthy that the lower courts ignored a threshold issue in this case – the nature and scope of the asserted property interest allegedly taken. Petitioner has prosecuted its case, including in this Court, on the assumption that it has a vested entitlement to a specific flow regime in the Black River passing by its property. This is plainly a mistaken premise as a matter of federal law because the operating manual for the Clearwater Dam contemplates that the operation of the dam will include deviations in the flow regime below the dam. It is also mistaken as a matter of state law, because neither the law of Arkansas nor of any other state gives a riparian land owner the right to insist that those upstream never take any action that will increase or decrease the volume of water flowing downstream at any particular point in time. Indeed, the law is exactly the opposite, that those owning land along a river must anticipate that they will have to share the benefits and burdens of riparian ownership with their neighbors. *See Harris v. Brooks*, 283 S.W.2d 129 (Ark. 1955). The nature of the underlying state property interest in this case appears to preclude Petitioner

from claiming an interference with a vested entitlement under any takings theory. At a minimum, the nature of the underlying state property interest may be relevant to the issue of whether there has been an interference with distinct investment-backed expectations sufficient to support a valid takings claim.

As to the merits of the decision by the U.S. Court of Appeals for the Federal Circuit, the Court should affirm the decision below. The Court has long held that a physical invasion or occupation constitutes a compensable taking only if it involves a permanent – or inevitably recurring – invasion or occupation. While the Court has suggested in *dictum* (outside of the flooding context) that a temporary occupation or invasion can constitute a taking under some circumstances, the Court should disavow this ill-considered *dictum* and affirm the longstanding permanency requirement. The permanency requirement comports with the language and original understanding of the Takings Clause and provides clear guidance to property owners, government officials and the general public. Moreover, preserving this requirement upholds the salutary doctrine of *stare decisis*. Alternatively, if the Court decides to jettison the longstanding permanency requirement, *amici curiae* urge the Court to rule that a temporary physical takings claim should be evaluated using the traditional *Penn Central* multi-factor analysis. The Court should certainly reject the radical proposal advanced by some of Petitioner's *amici curiae* that all physical occupations

and invasions, no matter how modest or temporary, should be subject to a single, sweeping *per se* rule.[3]

[3] There is also a substantial threshold question whether this claim is barred by the doctrine of sovereign immunity by virtue of 33 U.S.C. § 702c, which states: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood water at any place." As the Court said in *United States v. James*, 478 U.S. 597 (1986), this provision "outlines immunity in sweeping terms;" indeed, "it is difficult to imagine broader language." *Id*. at 604. This case plainly appears to involve a claim of "damage" arising "from or by floods or flood water" within the terms of the statute. *See* Pet. Br. at 43 (describing this lawsuit as seeking recovery for "massive and foreseeable damage" to private property). Moreover, "[a]ny ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012). Given the existence of the Tucker Act, sovereign immunity is rarely a disputed issue in modern takings cases. But a waiver of the government's immunity is clearly necessary to subject the United States to financial liability under the Takings Clause. *See Lynch v. United States*, 292 U.S. 571, 579 (1934); *Schillinger v. United States*, 155 U.S. 163, 168 (1894). *See also United States v. Mitchell*, 463 U.S. 206, 217 (1983) (explaining that the issue of whether a party can assert a substantive claim to financial compensation is analytically distinct from the issue of whether the United States has consented to be sued). *Cf. Webster v. Doe*, 486 U.S. 592, 613 (1998) (Scalia, J., dissenting) ("No one would suggest that, if Congress had not passed the Tucker Act, 28 U.S.C. § 1491(a)(1), the courts would be able to order disbursements from the treasury to pay for property taken under the lawful authority (and subsequently destroyed) without just compensation."). The conclusion that sovereign immunity bars this suit seeking financial compensation would not, of course, bar a claimant from seeking a declaratory judgment and a "corresponding injunction." *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498, 520 (1998)

(Continued on following page)

ARGUMENT

I. The Court's Resolution of this Unusual Case Involving the United States Could Have Significant Implications for Local Governments and Their Ability to Perform Some of Their Traditional Functions.

The facts of this relatively unique case have the potential to obscure the particular threats to local governments posed by the arguments of Petitioner and its *amici curiae* for extending physical takings doctrine to temporary occupations or invasions. In a variety of contexts, for a variety of important public purposes, government officials intentionally or inadvertently cause temporary or occasional physical invasions of private property. Exposing local taxpayers to potential financial liability under the Takings Clause for all such incidental injuries to property would impose significant new financial burdens on already straitened local governments as well as impede important government functions. In other words, in the context of temporary invasions or occupations, as much as with regulatory restrictions, "government hardly could go on" if it could be held liable under the Takings Clause every time it acted. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

(plurality). *See United States v. Lee*, 106 U.S. 196, 222-23 (1882) (recognizing the availability of a suit for injunctive relief against federal officials for an uncompensated taking prior to adoption of the Tucker Act).

Of most immediate concern, Petitioner's proposed takings theory would seriously undermine the ability of local governments to address a host of local water management issues. Managing the flow of storm water, sewage and other forms of water is one of the most important and difficult functions of local government. *See generally* Ass'n of State Flood Plain Managers, *Floodplain Management 2050* (2007), available at http://www.floods.org; The President's Federal Interagency Floodplain Management Task Force, *Sharing the Challenge: Floodplain Management Into the 21st Century* (1994), available at http://www.gpo.gov.

Accordingly, there are numerous state court decisions, arising in a host of different factual circumstances, addressing whether local water management decisions can give rise to takings liability. Given the inherent variability of water flows, the imperative for local government to construct and maintain significant water infrastructure, and the occasional need for government to choose (sometimes quickly) between two inevitable harms, many state courts have been reluctant to hold the public liable for a taking based on temporary, occasional, or incidental injuries to property attributable to governmental water management actions. *See, e.g., Allianz Global Risks U.S. Ins. Co. v. State*, 13 A.3d 256, 260 (N.H. 2010) (affirming rejection of takings claim based on property damage caused by state construction and widening of highway when plaintiff "produced no evidence that the circumstances which caused the flood damage are inevitably recurring");

Ondovchik Family Partnership Ltd. v. Agency of Transp., 996 A.2d 1170, 1186 (Vt. 2010) (rejecting takings claim based on damage to plaintiff's roadside property as a result of agency's snow removal activity, on the ground that this activity had merely resulted in "intermittent snow throw and water runoff"); *Edwards v. Hallsdale-Powell Utility Dist. Knox County*, 115 S.W.3d 461 (Tn. 2003) (rejecting takings claim based on flooding of plaintiff's home with sewage on two occasions on the ground that government had not taken a sufficiently "purposeful or intentional" action to support a viable takings claim). *But see Livingston v. Virginia Dept. of Transp.*, 726 S.E.2d 264 (Va. 2012) (rejecting, over strong dissent, lower court's conclusion that property owners could not proceed with a takings claim based on property damage associated with a single flooding event). The *amici curiae* believe the majority rule in this arena is legally supported and generates sound, practical outcomes. We urge the Court to avoid an interpretation of the Takings Clause that would impose unreasonable new burdens on local governments charged with addressing flooding threats and other serious water management challenges.

The Petitioner's expansive theory of physical takings liability could also impede other important local government functions. For example, State and local officials routinely conduct inspections of private property to help safeguard public health and safety. To date, takings claims based on such inspections have routinely been rejected, and the Court should take care in this case to avoid disturbing this long

settled precedent. Long ago, this Court rejected a claim that government inspections of private property without owner consent could give rise to takings liability. *See Montana Co. v. St. Louis Mining & Milling Co.,* 152 U.S. 160 (1894) (state statute authorizing physical inspections of private mine property not a taking). Subsequently, state courts have likewise rejected claims that government inspections of private property can give rise to takings liability. *See* Sandra Bullington, Entry Onto Private Property in 9 Nichols on Eminent Domain, Ch. 9-32, § G32.06, n. 8 (3rd ed. 2007) ("The overwhelming majority of cases have held that the entry onto private property for the purpose of conducting examinations and surveys does not constitute a taking."), citing *e.g., State by Waste Management Board v. Bruesehoff*, 343 N.W.2d 292, 295 (Minn. 1984); *Southern California Gas Co. v. Joseph W. Wolfskill Company*, 28 Cal. Rptr. 345, 349-350 (1963).

Numerous state statutes, designed to achieve a range of public goals, authorize public inspections of private property by government officials. *See, e.g.,* Ark. Code Ann. § 26-58-120 (2005) (authorizing inspection of timber processing facilities to ensure compliance with severance tax requirements); Wis. Stat. § 88.13 (2012) (authorizing entry by officials or agents upon "any land" for "any purpose" connected with repair or maintenance within drainage district or adjoining lands); Cal. Food & Agric. Code § 42821 (1967) (authorizing inspection of facilities engaged in the production or distribution of fruits and nuts);

Minn. Stat. § 18D.201 (2011) (authorizing inspections of agricultural chemical facilities); Mont. Code Ann. § 87-3-225 (1989) (authorizing inspection of fish hatcheries and culture facilities). A ruling by this Court authorizing the routine prosecution of takings claims based on government inspections of private premises would seriously undermine important, well-established government functions and responsibilities.

Amici curiae recognize that government inspections of private property raise legitimate concerns about whether officials are acting reasonably in conducting the inspections and/or whether owners' expectation of privacy are being unduly impaired. Traditionally, such issues have been addressed under the Fourth Amendment, largely in terms of whether a warrant is or is not required to conduct the inspection. *Compare Camara v. Municipal Court*, 387 U.S. 523, 530 (1967) (warrantless property inspection violates Fourth Amendment) *with Donovan v. Dewey*, 452 U.S. 594 (1981) (warrantless property inspection does not violate Fourth Amendment). Landowners would receive little additional protection for their legitimate privacy interests by transforming objections to property inspections into Fifth Amendment takings claims. On the other hand, this step would cause considerable mischief for state and local governments, especially if claims for compensation could be asserted regardless of whether a warrant had been obtained in advance of the inspection.

II. A Permanent or Inevitably Recurring Invasion or Occupation is Required to Hold the Government Liable for a Physical Taking.

The Court should affirm the ruling below. The U.S. Court of Appeals for the Federal Circuit properly rejected this takings claim based on this Court's longstanding rule that a permanent (or at least inevitably recurring) occupation or invasion of private property is required to support a property owner's claim that her property has been physically "taken" by the government under the Fifth Amendment.

Amici curiae recognize that *dictum* in some Court decisions suggests that temporary invasions or occupations can constitute takings, with the merits of such claims being subject to analysis using the *Penn Central* multi-factor framework. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 n. 9 (1982); *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539 (2005). However, neither the Court's actual prior holdings nor sound reasoning supports applying the Takings Clause to merely temporary occupations or invasions.

In a long series of decisions stretching back to the late 19th century the Court has addressed whether and under what circumstances government-caused flooding will support a takings claim. The rule emerging from these cases is that permanent flooding – and only permanent flooding – will support a takings claim. For the purpose of this longstanding rule,

"permanent" encompasses not only the permanent overflow of land, such as by water in a pool created behind a dam, but also a permanent condition exposing the owner to constantly recurring flooding. *See, e.g., United States v. Cress*, 243 U.S. 316, 328 (1926) (upholding a finding of a taking when erection of a lock and dam created a "permanent condition by which the land is subject to frequent overflows"). Summing up this body of precedent, the Court declared in *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924): "[I]n order to create an enforceable liability against the government" under the Takings Clause, an overflow with water must "constitute an actual permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property." *See also Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878) (a "permanent flooding of private property," involving "a physical invasion of the real estate of the private owner, and a practical ouster of his possession," can constitute a "taking"); *Pumpelly v. Green Bay & Mississippi Canal Co*., 80 U.S. 166, 177 (1871) (a taking occurred when "the overflow [caused by a dam] remained continuously [on Petitioner's private property] from the completion of the dam").

At the same time, the Court has recognized that "mere temporary invasions" do not constitute takings. *Loretto,* 458 U.S. at 428. *See also Sanguinetti,* 264 U.S. at 149 (ruling that the "condition" for a taking that there be "an actual, permanent invasion of the land" was "not met in this case"); *Bedford v. United*

States, 192 U.S. 217, 224-25 (1904) (riprap designed to maintain river channel that caused incidental flooding and erosion not a taking).

There are sound justifications for the requirement of permanency to establish a physical taking. First, this limitation on the scope of government liability is faithful to the language and original understanding of the Takings Clause. As the Court has repeatedly explained, until the beginning of the 20th century, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property," that is, a complete seizure of the property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lingle*, 544 U.S. at 537, quoting *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 1014 (1992), quoting *Transportation Co. v. Chicago,* 99 U.S. 642 (1879). This type of case obviously does not involve an actual seizure of private property. And, as a matter of common sense as well as precedent, only a "permanent" physical occupation can be equated with a "practical ouster of the owner's possession." *Id.* A merely temporary invasion may cause incidental injury, and may give rise to liability in tort or on some other theory, but it does not oust an owner of possession and lead to a taking.

Second, the permanency requirement has the virtue of creating a relatively bright line between the circumstances in which owners will be compensated and those in which the public will be protected from liability under the Takings Clause, creating certainty for property owners and government officials alike.

Governments at all levels of the federal system have major responsibilities for managing water flows, in particular for the purpose of promoting navigation, flood protection and storm water management. A rule that subjected government to the threat of takings liability for any injury to private property interests due to flooding, no matter how minor or infrequent, would impose a major financial burden on government, especially at the local level, both in terms of litigation costs and potential judgments. *Cf. Eastern Enterprises,* 524 U.S. at 542 (Kennedy, J., concurring in part and dissenting in part) (observing that another proposed expansion of takings doctrine would "subject[ ] states and municipalities to the potential of new and unforeseen claims in vast amounts").

Third, the principle of *stare decisis* strongly supports retention of the permanency requirement. The requirement of permanency pervades not only the Court's early cases but is central to the holdings in the Court's modern cases applying the physical takings rule. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (describing the imposition of an easement of indefinite duration as a taking); *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987) (describing the creation of a "permanent and continuous right to pass to and fro" over someone's real property as a taking); *Loretto*, *supra*. Moreover, as the Court has observed, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests

are involved." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

Finally, it is highly instructive that in states where the state takings clauses, like the federal Takings Clause, only protect against "takings," the state courts consistently insist that an invasion or occupation must be permanent to support a viable takings claim. *See, e.g., Marty v. State,* 838 P.2d 1384, 1388 (Idaho 1992) (affirming dismissal of takings claim under Idaho Constitution because inundation was neither permanent nor inevitably recurring); *Kingsway Cathedral v. Iowa Dept. of Transp*., 711 N.W.2d 6, 8-12 (Iowa 2006) (rejecting takings claim under the Iowa (and federal) Takings Clauses because activity allegedly causing property damage was only temporary in nature). By contrast, in states where the takings clauses authorize recoveries for "takings" and "*damaging*," the courts more frequently permit recoveries for temporary invasions or occupations. *See, e.g., Livingston v. Virginia Dept. of Transp.*, 726 S.E.2d 264, 271 (Va. 2012) (holding, over a strong dissent, that a single instance of flooding can establish a taking under Virginia's Constitution); *Bogue v. Clay County,* 60 N.W. 218, 224 (S.D. 1953) (affirming lower court finding of a taking under the South Dakota Constitution for "temporary taking" due to inundation). Viewing this case through the lens offered by these state court decisions, Petitioner's argument to expand federal takings doctrine to include temporary invasions or occupations amounts to a petition to rewrite the federal Takings Clause as follows: "Nor

shall private property be taken *or damaged* for public use, without just compensation." The Court should reject this petition because (1) the Court obviously has no authority to insert new language in the constitutional text, and (2) taking this step would effectively obliterate the distinctions embedded in state takings jurisprudence based on the individual states' careful choices to include – or omit – the word "damage" in their takings clauses.[4]

Amici curiae recognize that the Court's *Loretto* decision suggests in *dictum* that a temporary occupation or invasion can result in a taking. But, upon examination, that decision provides no genuine support for this suggestion, and in fact the decision supports the rule that only a permanent physical occupation or invasion can constitute a taking. The decision refers to several cases ostensibly illustrating that "temporary" invasions can constitute takings – including *Pruneyard Shopping Center v. Robbins,* 447 U.S. 74 (1980), *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and what the Court refers to as "the intermittent flooding cases." *See* 458 U.S. at 435 n. 12. But all of these cases actually involved a permanent invasion

[4] It is instructive that *amicus* National Association of Homebuilders, in its brief in support of the petition for *certiorari,* referred to *Fitzpatrick v. Okanagon County*, 238 P.2d 1129 (Wash. 2010), as an example of a case "acknowledge[ing] that just compensation is required in the context of temporary flooding cases" (Br. at 11) – but failed to recognize or acknowledge that the Washington State Takings Clause addresses takings *and damaging*.

or occupation as the Court has defined that concept, that is, (1) an actual permanent intrusion or (2) creation of a permanent condition subjecting an owner to indefinitely recurring intrusions.

In particular, *Pruneyard* involved a takings claim based on enforcement of a state constitutional provision the California Supreme Court had interpreted to require owners of private shopping malls to open their properties to political leafleteers. This government intrusion represented the kind of indefinite invasion that the Court has characterized as a "permanent physical occupation." *See Nollan,* 483 U.S. at 832 (a "permanent physical occupation" occurs when "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises"). *Kaiser Aetna* involved a federal mandate requiring a property owner to allow indefinite public access to a previously "private pond," and therefore plainly involved a permanent physical taking. Finally, the "intermittent flooding" cases, even if they did not involve literally permanent occupations, certainly involved "permanent condition[s] . . . by which the land [was] subject to frequent overflows," *Cress*, at 328. Therefore, they also fall within the scope of the Court's established rule governing permanent physical occupations or invasions. In sum, all of the cases the *Loretto* Court referred to in *dictum* as supposedly supporting the idea that a temporary

physical invasion or occupation can constitute a taking do not, in fact, support that proposition.[5]

The conclusion that merely temporary invasions or occupations do not constitute takings is consistent with the Court's decisions holding, in a different context, that direct "appropriations" generally do constitute takings regardless of the duration of the appropriation. *See, e.g., Kimball Laundry v. United States,* 338 U.S. 1 (1949); *United States v. General Motors*, 323 U.S. 373 (1945); *United States v. Petty Motor Co.,* 327 U.S. 372 (1946). While a physical invasion or occupation, on the one hand, and an appropriation, on the other hand, are sometimes lumped together for the purpose of discussion, these two types of intrusions are actually distinguishable from each other for the purpose of takings analysis, as the Court itself has recognized: "The paradigmatic taking . . . is a direct appropriation *or* physical invasion of private property." *Lingle*, 544 U.S. at 537 (emphasis added). A direct appropriation involves a complete seizure of

[5] The decision that perhaps comes closest to supporting the idea that a temporary invasion or occupation might constitute a taking is *United States v. Causby*, 328 U.S. 256 (1946), in which the Court ruled that government planes continuously passing very low over plaintiffs' property during takeoffs and landings, and causing very considerable economic loss in the process, constituted a taking. This case can be distinguished from the ordinary temporary invasion or occupation because, at the time of the alleged taking, the government projected continuing the overflights for up to 25 years. *Id.* at 258. Understandably, the Court has subsequently described *Causby* as an example of a permanent (indefinite) physical occupation. *See Lucas,* 505 U.S. at 1015.

ownership and possession of private property by the government, typically accomplished through a formal exercise of the eminent domain power. None of the so-called World War II seizure cases cited above expressly addressed the question of whether a taking had occurred. But the Court assumed – correctly, in our view – that the direct appropriation of private property, even for a limited term, is a taking. *See also United States v. Pewee Coal Co.,* 341 U.S. 114 (1951) (finding a taking when the President issued an Executive Order directing the Secretary of the Interior to take possession of and operate private coal mines for a limited period on behalf of the public); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302, 324 n. 19 (2002) ("Condemnation of a leasehold gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose.").

By contrast, mere physical invasions or occupations, though they surely divest owners of a "fundamental" property interest, that is, the right to exclude others from the property, *see Kaiser Aetna*, 444 U.S. at 179, do not generally divest the owner of every attribute of property ownership. In the case of Ms. Loretto, for example, the cable company's installation of the cable box on her building did not deprive her of the ability to rent her apartments, earn income from her building, and generally treat the building as her property.

The conclusion that merely temporary invasions or occupations do not constitute takings is also consistent with the Court's recognition that temporary regulatory restrictions on property use may, in some rare circumstances, constitute takings under *Penn Central*. *See Tahoe-Sierra*. This differential treatment is explained and justified by the distinction between "classic takings," *Lingle*, 544 U.S. at 539, including direct appropriations and ousters due to permanent physical invasions or occupations, and regulatory takings. Classic takings are government intrusions that self-evidently constitute takings. By contrast, regulatory takings doctrine, which is essentially a judicial invention, *see Lingle*, 544 U.S. at 537, depends on identifying government actions that do not fit the definition of a classic taking but nonetheless should be deemed takings because they are "functionally equivalent" to classic takings in terms of their effects on property owners. *Id*. In other words, the former type of takings claim involves application of clear rules whereas the latter type proceeds by a process of reasoning by analogy. As the Court explained in *Tahoe-Sierra*:

> our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward applications of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries."

Id. at 322, quoting *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978). Given the

generally *ad hoc* nature of the search for functional equivalence in regulatory takings cases, the Court has understandably left open the possibility that certain temporary restrictions can be so burdensome that they may qualify as the functional equivalent of "true" takings. By contrast, in the case of physical takings, where the application of the Takings Clause is direct and straightforward, there is no warrant for ambiguity or interpretation: a permanent (or inevitably recurring) physical invasion or occupation is a taking; a merely temporary invasion or occupation is not.

The upshot of the various distinctions previously drawn by the Court between different types of takings claims can be summarized as followed in terms of (1) whether and how the so-called parcel as a whole rule applies to each type of claim, and (2) whether a particular claim is governed by a *per se* takings rule or the *ad hoc Penn Central* analysis. The two issues are closely related, in the sense that the more intrusive the government action the more the Court's decisions tend to deploy the Takings Clause as a protection against uncompensated intrusions, *either* by defining the relevant parcel more narrowly or by applying a relatively strict takings test. But, in doctrinal terms, the issues are quite different: the parcel issue addresses the question of how to define the unit of "property" affected by government action; the applicability *vel non* of a *per se* takings test goes to the issue of whether the government action constitutes a "taking."

The parcel as a whole rule does not come into play in the case of direct appropriations, in either the geographic or the temporal dimension. In other words, in defining the unit of property, the Court has deemed it irrelevant whether the appropriated area of property is part of a larger parcel or whether the appropriation lasts permanently (or at least indefinitely) or for a limited term. *See, e.g., Kimball Laundry, supra*. Also in the case of a physical invasion or occupation, the parcel rule does not apply in the geographic dimension, meaning that the relevant unit of property is the specific area affected by the intrusion, whether or not such area is all of the claimant's property or part of a larger parcel. On the other hand, the Court has made clear that the parcel rule does apply in the temporal dimension, making the duration of the invasion highly relevant if not decisive for the disposition of this type of claim. *See Loretto, supra* (using the term "permanent" 25 times to underscore the point that the takings test articulated in this case is limited to permanent occupations or invasions). Finally, in the case of an alleged regulatory taking, the parcel as a whole rule applies in *both* the geographic and the temporal dimensions, meaning that the effect of a restriction on the use of a portion of property must be assessed in the context of the larger parcel of which the restricted portion is a part and, likewise, in relation to the entire life of the property. *See Tahoe-Sierra, supra*.

The Court's decision in *Tahoe-Sierra* reflects a clear recognition of the importance of these distinctions.

"When the government physically takes possession of an interest in property for some public purpose," the Court said, "compensation is mandated . . . even though that use is temporary." 535 U.S. at 322. By contrast, the Court said, when the government effects a taking under the *Loretto* rule, "it is required to pay for [the property occupied] no matter how small" the area affected. *Id*. In this latter context, consistent with the Court's longstanding articulation of its rule for permanent physical occupations, the Court did *not* say that the rule applies to purely temporary intrusions. Finally, the actual holding in *Tahoe-Sierra* reflects, of course, the conclusion that, in the regulatory takings context, the parcel as a whole rule applies in *both* the geographic and temporal dimensions.

As discussed, the question of whether a claim is governed by a *per se* takings test is distinct from the question of how to define the relevant parcel. As the Court recently explained, the "polestar" of the Court's takings jurisprudence is the guidelines provided in *Penn Central*. *Tahoe-Sierra*, 535 U.S. at 326 n. 23. Under *Penn Central*, courts evaluate a takings claim by considering (1) the economic impact of the government action, (2) the degree of interference with investment-backed expectations, and (3) the character of the government action. *Lingle*, 544 U.S. at 538-39. In addition to this general, default standard, the Court has established a relatively narrow set of *per se* or categorical tests, such as for permanent physical occupations, *see Loretto,* or regulatory restrictions

that render the property valueless. *See Lucas*. *See also Lingle*, 544 U.S. at 539 (describing the *Nollan* and *Dolan* tests governing "exactions"). The Court's cases addressing direct appropriations also implicitly apply what amounts to a *per se* takings test; or perhaps it would be more accurate to say that the Court has simply treated "an actual taking of possession and control" as a self-evident taking. *Pewee Coal Co.,* 341 U.S. at 116.

In essence, using a *per se* takings test means that a court often evaluates the claim based on a single *Penn Central* factor alone, ignoring the other factors. For example, in the case of a physical taking claim based on a permanent invasion or occupation, the Court has said that the character factor resolves the claim and the case must be evaluated without regard to the remaining two *Penn Central* factors, that is, the economic impact of the action or the degree of interference with investment-backed expectations. *See Loretto*, 458 U.S. at 434-35 ("[W]hen the 'character of the governmental action' . . . is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner"). Similarly, in the case of the *per se Lucas* test, the Court has said that when the economic impact rises to the level of a total denial of all economic use, the taking claim must be evaluated based on the economic impact factor alone, without regard to the other *Penn Central* factors, that is,

investment-backed expectations and the character or purpose of the regulations. *See Lucas*, 505 U.S. at 1017-18 & n. 8.

Combining the Court's relevant parcel rules and its different takings tests, the Court's takings jurisprudence has generated the following general guidelines: (1) a direct appropriation of any portion of a property for any period of time will generally constitute an automatic or *per se* taking; (2) a permanent physical invasion or occupation of private property will also generally result in a *per se* taking; and (3) a regulatory prohibition on use destroying the value of an entire property on a permanent or indefinite basis will generally constitute a *per se* taking under the *Lucas* rule. On the other hand, if a regulatory restriction applies to less than all of the property in a geographic sense, the restriction allows the owner to continue to make some economic use of the property, and/or the restriction is imposed only on a temporary basis, the regulatory restriction will amount, at most, to a potential *Penn Central* claim.[6]

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[6] To be sure, the Court's decisions arguably leave some questions unresolved. For example, the Court's *Lucas* total takings test apparently applies exclusively to regulations affecting fee simple interests in land, *see Tahoe-Sierra,* 535 U.S. at 330 (describing the *Lucas* rule as applying to the "permanent 'obliteration of the value' of a fee simple estate"), but some lower courts have ruled that the test applies to far more limited interests in property. *See, e.g., Cane Tennessee, Inc. v. United States,* 60 Fed.Cl. 694 (2004) (applying *Lucas* to a royalty interest in a mineral estate). In addition, a literal application of the *Lucas per se* rule might suggest that a claimant's advance

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This framework developed by the Court offers a clear set of rules for applying the Takings Clause in different ways to different types of government actions that implicate the core concerns underlying the Takings Clause in different ways. Direct government appropriations, physical invasions or occupations, and restrictions on the use of property can be identified and distinguished from each other by the courts and litigants with relative ease. In addition, each of these types of government action involves different degrees of intrusion into private property interests, justifying different levels of scrutiny under the Takings Clause. As discussed, a direct appropriation unquestionably represents the most severe form of government interference with private property rights because it affects the full range of an owner's interests in property. A physical invasion or occupation intrudes upon the "treasured" right to exclude, *see Loretto*, 458 U.S. at 435, and therefore is more serious in nature than a mere restriction on property use, but represents a less serious intrusion than a direct appropriation because it impairs only one (albeit an important) strand in the bundle of property rights.

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notice of regulatory constraints should always be irrelevant in a *Lucas*-type case. But that approach would allow a developer who was granted permission to develop the larger part of a property to later convey out a small undeveloped part of the property to a new owner for the express purpose of manufacturing a *Lucas* claim, effectively eviscerating the parcel as a whole rule in the regulatory takings context. The Court need not worry about these loose threads in applying its well-developed analytic framework to this takings case.

Finally, regulatory restrictions on property use call for the least demanding level of scrutiny under the Takings Clause because they typically affect the right-to-use strand in the bundle of property sticks in a fashion that produces a "reciprocity of advantage" for all affected property owners. *See Lucas*, 505 U.S. at 1017 (referring to the Court's "usual assumption," except in the "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted," that "the legislature is simply adjusting the benefits and burdens of economic life . . . in a manner that secures an average reciprocity of advantage to everyone concerned") (emphasis in original; internal citations and quotations omitted). This framework, developed in painstaking fashion by the Court over many decades, achieves a proper balance between articulating predictable rules, for the benefit of property owners, government officials and the public as a whole, and formulating legal doctrine that is responsive to the different levels of concern for private property protection raised by different types of government actions.

The conclusion that permanent government occupations or invasions invariably result in takings fits logically into the framework described above. The permanency requirement for physical takings claims differentiates highly intrusive direct appropriations from still serious but less intrusive occupations or invasions. On the other hand, the Court's strict takings rule applicable to physical invasions or occupations means that such claims will generally be upheld

no matter how modest the economic impact or the degree of interference with investment-backed expectations. As a result, in this important respect, the Court's takings jurisprudence provides greater protection from government physical intrusions than from regulatory restrictions on use.

Finally, it is noteworthy that the longstanding permanency requirement for physical takings claims based on occupations or invasions does not preclude property owners from potentially recovering for temporary intrusions on some alternate theory – under tort law, for example. The Court has repeatedly recognized that even if a flooding does not have the element of permanence required to support a taking claim, recovery under a tort theory might be available. *See, e.g., Sanguinetti*, 264 U.S. at 150; *see also Keokuk & Hamilton Bridge Co. v. United States*, 260 U.S. 125 (1922). Under the Federal Tort Claims Act, the United States has waived sovereign immunity in various kinds of tort actions, including certain tort claims arising from water management actions. *See In re Katrina Canal Breaches Litigation*, 673 F.3d 381 (5th Cir. 2012) (upholding ruling that United States was liable in tort for property damages caused by faulty U.S. Army Corps of Engineers' technical calculations leading to delay in armoring banks of navigation channel). To be sure, 33 U.S.C. § 702c, discussed above, *see* note 3, *supra*, preserves government immunity from liability in tort (as well as takings) for damage due to the operations of flood-control projects. But that policy is subject to legislative revision or modification. The fact that the extent of

public liability in tort for damages attributable to flood control projects is subject to congressional control does not ultimately differentiate tort claims from takings claims because, as discussed above, the extent of United States's liability for takings is also dependent upon Congress's decision to waive the sovereign immunity of the United States.

Adhering to the Court's longstanding rule that claims that government action has resulted in a physical taking of private property requires a showing of a permanent (or at least indefinite) invasion or occupation of private property, the Court should affirm the judgment below rejecting this takings claim.

III. In the Alternative, the Court Should Apply the Traditional *Penn Central* Framework.

For the reasons discussed, the Court should rule that the Federal Circuit properly rejected the claim on the ground that the government's action involves a temporary intrusion. However, if the Court rejects that argument (and also concludes that the doctrine of sovereign immunity does not bar the claim), the Court should recognize that the claim must be analyzed using the traditional *Penn Central* framework. The *Penn Central* framework represents, as discussed above, the "polestar" of the Court's modern takings jurisprudence and there would be no good reason to depart from that framework in this case. Following *Penn Central*, virtually every Supreme Court decision applying a takings test to a cognizable property

interest – apart from those governed by the Court's narrow *per se* rules – has utilized the *Penn Central* framework. The only notable exceptions are cases applying the distinctive test long applied in the specialized utility rate-making context, *see, e.g.*, *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), so-called exactions cases involving physical takings imposed as a condition of regulatory authorizations, *see Lingle v. Chevron USA,* 544 U.S. 528, 538, 546 (2005), and cases involving the now-repudiated "substantially advances" takings test. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980). In addition, extensive litigation in this Court as well as the lower courts over the last several decades has significantly clarified the *Penn Central* analysis, producing a reasonably coherent and predictable body of law. *See, e.g.,* Thomas W. Merrill*, The Character of the Governmental Action*, 36 Vt. L. Rev. 649 (2012). There would simply be no reason to depart from the *Penn Central* framework in this case.

On the other hand, it would be a serious mistake to embrace a novel, *sui generis* takings standard for non-permanent flooding cases, or even physical intrusion cases more generally, as suggested (in quite different versions) both by Petitioner and Respondent. *See* Pet. Br. at 27, Resp. Br. at 14-15. Such a course would needlessly complicate takings doctrine and introduce an artificial formalism into the law. Litigation over when to apply a *per se* takings test or the *Penn Central* framework already consumes undue attention from the federal and state courts. *See, e.g.,*

Casitas Municipal Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008) (debating whether a taking claim based on regulatory mandate to direct water through a fish ladder represents a physical taking or a potential regulatory taking); *Coast Range Conifers, LLC v. State of Oregon*, 117 P.3d 990 (Or. 2005) (addressing whether regulatory constraints on commercial timber operations represent a physical taking or a potential regulatory taking). No good purpose would be served by embracing yet another doctrinal innovation in the takings realm that would require further judicial policing of the boundaries between different takings tests.

Given that the *Penn Central* framework represents the Court's default takings standard, it is hardly surprising that the Court has assumed, albeit in *dictum*, that a takings claim based on a temporary occupation or invasion would be governed by *Penn Central*. *See Loretto,* 458 U.S. at 435 n. 12; *Lingle,* 544 U.S. at 539. For the reasons discussed, *amici curiae* believe that the Court was mistaken in assuming, in *dictum* and without extended analysis, that the Takings Clause even applies to temporary physical intrusions. But passing that fundamental point, there would be no reason not to conclude, if the Takings Clause applies in this context, that *Penn Central* provides the appropriate analytic framework.[7]

[7] Some of petitioner's *amici curiae* go even further and advocate application of a *per se* takings rule for temporary

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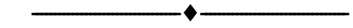
Applying the *Penn Central* framework to this case would unquestionably lead to the conclusion that the claim was properly rejected. While Petitioner has claimed not insubstantial property damage, the alleged intrusion was temporary in nature, merely involved modest additional inundation of an area that was already subject to regular inundations, and the alleged damage to the timber stand itself was temporary in nature. On the other hand, the Petitioner can hardly claim any extensive interference with investment-backed expectations, given the inherent hazards of property ownership in a floodplain and the very qualified nature of riparian land rights under Arkansas law. Finally, with respect to the character of the government action, the Army Corps of Engineers was faced with the classic responsibility of having to make a choice between harming one class of property or another, *see Miller v. Schoene*, 276 U.S. 272 (1928), the kind of choice that in fairness and justice cannot give rise to takings liability. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).



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invasions or occupations, effectively expanding *Loretto*'s narrow rule for permanent physical invasions or occupations to all invasions or occupations regardless of their duration. The Court should certainly reject this radical proposal. There is no shred of support in the Court's prior decisions or common sense for this idea. For the reasons discussed, adoption of this proposal would have devastating adverse effects on local governments across the United States.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

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