No. _____

In The
Supreme Court of the United States

ST. BERNARD PARISH GOVERNMENT, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Arkansas Game*, this Court admonished the Federal Circuit to eschew "blanket exclusionary rules" immunizing the Government from liability in takings cases. *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 37 (2012). Nevertheless, the Federal Circuit in this case adopted *two* such categorical exemptions. The questions presented are:

1. When a government project foreseeably causes catastrophic flooding of private property, is the Government categorically exempt from takings liability on the ground that its failure to take steps to prevent or mitigate the project's destructive effects amounts to "inaction"?

2. Is the Government categorically exempt from takings liability any time a government flood control structure fails to prevent flooding, even if the Government's own intentional conduct relating to a separate project having nothing to do with flood control foreseeably caused the failure of the flood control structure and the resulting flooding?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The following parties were plaintiffs–cross-appellants below and are Petitioners in this Court: St. Bernard Parish Government, Gwendolyn Adams, Henry Adams, Cynthia Bordelon, Steven Bordelon, Steve's Mobile Home & RV Repair, Inc., Edward Robin, Sr., Edward "Pete" Robin, Jr., Brad Robin, Robin Seafood Company, Inc., Robin Yscloskey Development #1, LLC, Robin Yscloskey Development #2, LLC, Robin Yscloskey Development #3, LLC, Robin Yscloskey Development #4, LLC, Rocco Tommaseo, Tommoso "Tommy" Tommaseo, Rocky and Carlo, Inc., Port Ship Service, Inc., and Other Owners of Real Property in St. Bernard Parish or the Lower Ninth Ward of the City of New Orleans. Each of these Petitioners is a Petitioner individually and on behalf of all others similarly situated. The caption below identified the certified class as Other Owners of Real Property in St. Bernard Parish or the Lower Ninth Ward of the City of New Orleans.

The United States was the defendant–appellant below and is the Respondent here.

None of the Petitioners is a publicly held company, and no publicly held company owns 10% or more of any Applicant's stock. Robin Capital Holdings, LLC, is the parent company of Robin Yscloskey Development #1, LLC, Robin Yscloskey Development #2, LLC, Robin Yscloskey Development #3, LLC, and Robin Yscloskey Development #4, LLC. None of the other Petitioners has a parent company.

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PRELIMINARY STATEMENT

In *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23 (2012), this Court reversed a Federal Circuit decision holding that the Government is categorically exempt from liability for temporary takings in flooding cases. Noting the "nearly infinite variety of ways in which government actions or regulations can affect property interests," *id*. at 31, this Court held that "[f]looding cases, like other takings cases, should be assessed with reference to the particular circumstances of each case, and not by resorting to blanket exclusionary rules," *id.* at 37 (quotation marks omitted). To emphasize its point, the Court noted sternly that "[t]ime and again," it had rejected Government claims of "blanket exemptions from the Fifth Amendment's instruction." *Id.*

Undaunted by this *unanimous* decision, the Federal Circuit in this flooding case is at it again, this time adopting not one but *two* blanket exclusionary rules urged by the Government to bar Petitioners' temporary takings claim. The panel deployed its new rules to reverse a judgment of the Court of Federal Claims ("CFC") despite the CFC's finding, which the panel did not question, that the Government's construction and operation of a navigation channel foreseeably caused widespread breaching of a nearby (but independently-constructed) flood control levee, resulting in catastrophic flooding of Petitioners' properties.

The panel's new categorical exclusions are remarkable not only because their very adoption flies in

the face of this Court's contrary instruction (which the panel did not even mention), but because they conflict with several of this Court's takings precedents, grate on several others, and, worse, defeat the central purpose of the Takings Clause. Indeed, they have no apparent animating rationale other than to serve the Government's innate interest in "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

1. The first categorical rule adopted below is that the Government is always immune from takings liability for *inaction*: "On a takings theory, the government cannot be liable for failure to act, but only for affirmative acts." App.10a. According to the Federal Circuit, this Court's decision in *United States v. Sponenbarger*, 308 U.S. 256 (1939), "establish[ed] that takings liability does not arise from government inaction or failure to act." App.12a. The radical scope of the Federal Circuit's categorical rule is underscored by the nature of the Government's "inaction" here—its failure to take steps to prevent the foreseeable (indeed, *foreseen*) natural consequences of its own earlier *actions* (the construction and operation of the navigation channel) that ultimately caused the destructive flooding.

Were the scope of the Takings Clause categorically limited in this sweeping way, one would expect to find decisions saying so long before 2018. Yet the court below cited no case, and our research has found none, that says anything remotely like this. Certainly *Sponenbarger* says nothing of the kind; it merely stands

for the unremarkable proposition that when the Government undertakes to build a flood control project designed to protect landowners from "unpredictable major floods to which [their] land had always been subject," it does not incur takings liability to those it "fails to or cannot protect." 308 U.S. at 265.

It is not surprising that no court has previously held that the Takings Clause is blind to the destruction of property foreseeably caused by a deliberate government decision not to take certain action to prevent it, for such a categorical rule cannot survive even a few moments of careful thought. After all, the difference between a permanent taking and a temporary taking is often the Government's *inaction* in the face of its prior action. "The Court has recognized in more than one case that the government may elect to abandon its intrusion or discontinue regulations." *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 317 (1987). If an interference with property rights that "is intended or is the foreseeable result of authorized government action" can constitute a taking, *Arkansas Game*, 568 U.S. at 39, there is no reason the same would not also be true if the interference is the intended or foreseeable result of authorized government *inaction*—at least when, as here, the "inaction" is the Government's failure to address the foreseeable natural consequences of its earlier *actions*.

All of these points come together in *United States v. Dickinson*, 331 U.S. 745 (1947), which conflicts directly with the decision below on closely similar facts. There the Government argued that it was categorically

exempt from takings liability for its failure to take action to prevent land loss caused by erosion along the banks of a navigable body of water (erosion set in motion by earlier government action, the construction of a dam). This Court, however, found the Government liable for erosion that was "preventable by prudent measures," and affirmed an award for "the cost of that prevention." *Id.* at 751.

2. The second categorical rule adopted by the Federal Circuit establishes a legal causation standard for flooding cases that requires courts, anomalously, to blind themselves to the actual cause of the flooding. When the Government undertakes a public works project designed to protect a community from natural flood hazards—say, by constructing a levee system along the banks of a river—but the project ultimately fails to subdue the forces of nature, the Government is not liable for resulting damage since "the same floods and the same damages would occur had the Government undertaken no work of any kind." *Sponenbarger*, 308 U.S. at 265. "If major floods may sometime in the future overrun the river's banks despite—not because of—the Government's best efforts, the Government has not taken [the landowner's] property," because "[t]he Government has not subjected [the] land to any *additional* flooding, above what would occur if the Government had not acted . . . ." *Id.* at 266 (emphasis added).

In this case, the Federal Circuit, at the Government's urging, has stretched this wholly unexceptionable principle into a sweeping immunity from takings liability whenever a government flood control

structure fails to prevent flooding, even if *the Government's own intentional conduct*—here, its construction and operation of a separate project having nothing to do with flood control—*foreseeably caused the failure of the flood control structure and the resulting flooding.* The Government framed its theory in blunt terms before the Federal Circuit: "Congress [is] not required to authorize the construction of [a flood control structure] in the first place, and the [structure's] failure to contain . . . floodwaters—*whatever its cause*—is not a basis for federal takings liability." Reply and Response Brief for the United States at 4 (emphasis added). According to the Government, the causation question must ignore the Government's role in causing the failure of the structure and simply ask, as in *Sponenbarger*, whether the flooding would have occurred if the Government had not built the flood control structure in the first place—an inquiry that the Government, conveniently, cannot lose, for it will always be the case that the flooding would have occurred if the flood protection project had never been built. And this is true even in cases, like this one, where it is found that intentional government action having nothing to do with flood control foreseeably caused that failure.

The Federal Circuit adopted the Government's theory *in toto*. Henceforth, whenever a federal flood control structure fails to prevent natural flooding, the Government cannot, as a matter of law, be found to have caused the flooding, no matter what the Government did, as a matter of fact, to foreseeably cause the failure. It is difficult to imagine a rule more squarely

at odds with this Court's admonition to the Federal Circuit to eschew blanket exclusions in takings cases and, instead, to "weigh carefully the relevant factors and circumstances in each case . . . ." *Arkansas Game*, 568 U.S. at 36.

Nothing good can come from allowing the Federal Circuit's latest exclusionary rules to percolate in that court. These new doctrines can only produce injustice, as they will inevitably require rejection of takings claims in cases in which a careful weighing of the relevant facts and circumstances would lead to a different outcome. That is precisely what would have happened in *Arkansas Game* if the Court had let the Federal Circuit's decision stand. And that is certainly what will happen here, and in untold future cases, absent intervention from this Court.

OPINIONS BELOW

The opinion of the Federal Circuit is reported at 887 F.3d 1354. App.1a. The CFC's liability decision is reported at 121 Fed. Cl. 687, App.28a, and its damages decision is reported at 126 Fed. Cl. 707, App.179a.

JURISDICTION

The Federal Circuit entered judgment on April 20, 2018. On July 3, 2018, the Chief Justice extended the time for seeking certiorari to August 31, 2018, and on

August 21, 2018, the Chief Justice further extended the time to September 17, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The questions presented in this takings case arise from the interaction of two separate federal public works projects in connection with the catastrophic flooding suffered during Hurricane Katrina by communities in New Orleans' Lower Ninth Ward ("Lower Ninth") and St. Bernard Parish ("Parish") (an area collectively referred to as the St. Bernard Polder ("Polder")). Both projects were designed, constructed, and operated by the Army Corps of Engineers ("Corps"). One project, the Lake Pontchartrain and Vicinity Hurricane Protection Project ("LPV"), is a vast 125-mile levee system, encircling much of greater New Orleans and the Parish, that was designed to protect the area from hurricane and tropical storm flooding. *See* Figure 1.

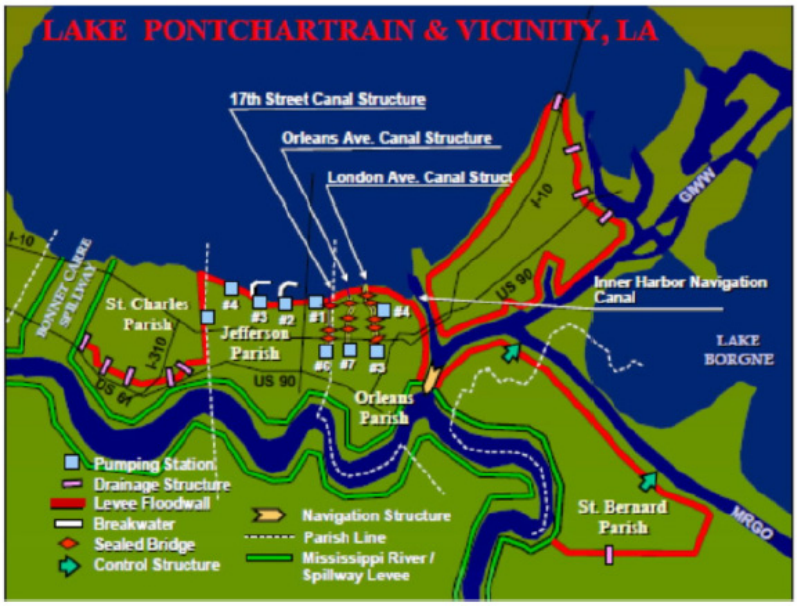

Figure 1 (App.44a).

The other project, the Mississippi River-Gulf Outlet ("MRGO"), is a 76-mile deep-draft navigation channel designed to provide a shorter shipping route between the Port of New Orleans and the Gulf. *See* Figure 2.

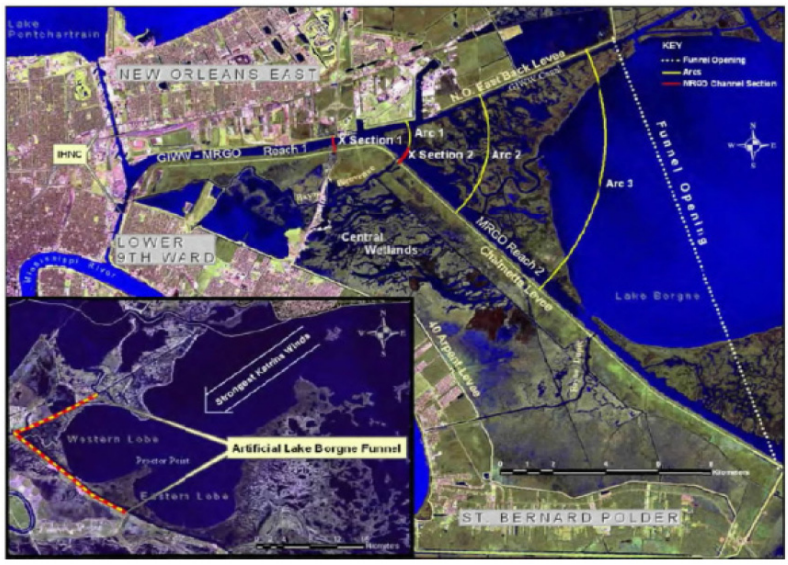

Figure 2 (App.52a).

The trial court found, based on a voluminous record consisting in large part of the Government's own studies, reports, and internal analyses, that the flooding in the Lower Ninth and the Parish resulted largely from extensive breaches in a portion of the LPV known as the Chalmette levee, *see* Figure 3 below, and that those breaches were foreseeably caused by the Corps' "construction, expansions, operation, and failure to maintain the MR-GO," App.176a. In other words, the trial court found that absent MRGO, Petitioners' properties would have suffered minor flooding, at most, from overtopping of the LPV. App.151a-52a.

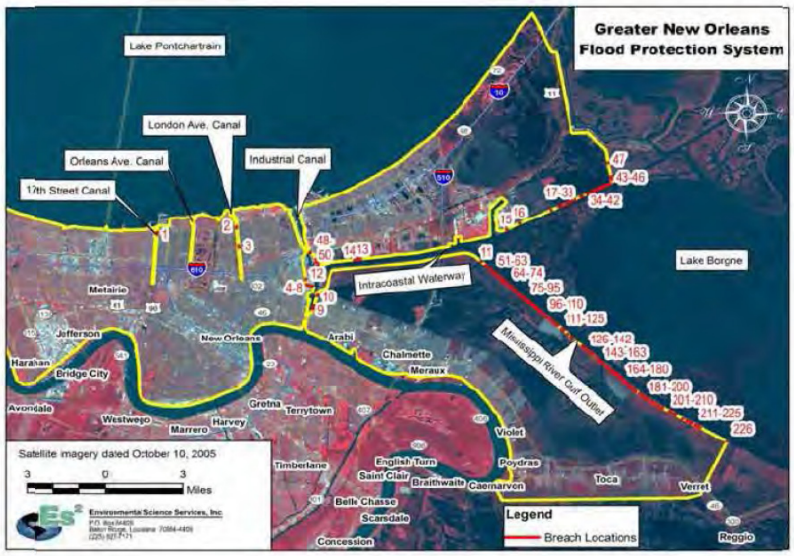

Figure 3 (Kemp Testimony at 133).

A. The MRGO Project

Authorized by Congress in 1956, construction of MRGO was substantially completed by 1968. App.4a. The MRGO channel, as constructed, was 650 feet wide, and it cut through and abutted the Parish and the Lower Ninth. App.128a. The facts concerning MRGO of particular relevance here are two-fold.

First, as early as 1957, the Corps was specifically warned of the "enormous danger" of flooding that MRGO would pose to the populated areas of the Polder during hurricane conditions, both because vast areas of wetlands would be devastated by saltwater entering from the Gulf and because the channel would create an "avenue" for storm surge to "reach[] the [Polder] in full

force . . . ." App.47a. As predicted, MRGO created a conduit for saltwater intrusion from the Gulf, ultimately destroying tens of thousands of acres of cypress and tupelo forest, and fresh and intermediate marsh, that had acted for centuries as natural "horizontal levees" buffering the Polder against storm winds and surge. *E.g.*, App.114a-27a, 133a-41a.

Second, throughout the life of the project, the Corps repeatedly made the deliberate decision not to armor MRGO's banks, opting instead to permit their steady erosion from powerful ship wakes and to acquire through eminent domain the land that vanished as the channel widened. App.107a-10a. Decades of maintenance dredging and ship traffic took their toll, severely eroding MRGO's unprotected banks and expanding the channel from its original design width of 650 feet to as much as 3,000 feet, App.132a, providing a critical "fetch" of open water to amplify the size and force of waves and surge against the Chalmette levee during severe storms. Figures 4 and 5 illustrate the widening along two stretches of MRGO:

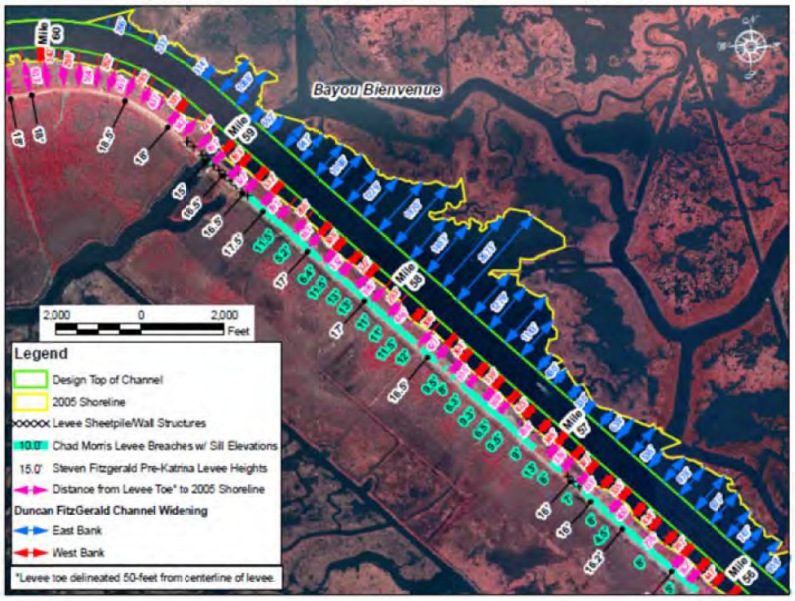

Figure 4 (Kemp Testimony at 30).

Figure 5 (Kemp Testimony at 30).

In 1984, the Corps observed internally that "[w]ind- and wave-generated erosion is also steadily widening the MR-GO," to the point that "the east bank along Lake Borgne is dangerously close to being breached. Once the bank is breached, development to the southwest [i.e., the communities in which Plaintiffs' properties are located] would be exposed to direct hurricane attacks from Lake Borgne." App.109a. In 1988 the Corps again analyzed the alarming rate at which MRGO's banks were eroding, which by then had widened the channel from 650 feet to 1,500 feet. App.128a. The Corps noted again that "[c]ontinued erosion threatens to produce large breaches in the rapidly dwindling marsh buffer between the navigation channel and the open waters of Lake Borgne. . . ." SPX247 at 46. In light of the impending danger to the Lower Ninth and the Parish of "direct hurricane attacks from Lake Borgne," App.109a, the Corps emphasized: "[T]he alternative to completely close the MRGO waterway should be evaluated. . . . [Such closure would] control[] bank erosion, . . . prevent[] saltwater intrusion, and . . . reduce the possibility of catastrophic damage to urban areas by a hurricane surge coming up this waterway," App.128a-29a.

Despite its specific knowledge of the growing risk of potentially "catastrophic damage" posed by MRGO, the Corps did nothing to mitigate that risk. There was "no evidence that the MRGO project was ever modified to reduce the predictable excess surge stresses and wave attack caused by encroachment of [MRGO] on LPV structures . . . ." App.150a; *see also* App.10a. To

the contrary, as the trial court specifically found, the "Corps' *policy* was to allow bank erosion of the MR-GO to continue unabated." App.110a (emphasis added). And the steady increase in the known flooding risk continued unabated as well.

In sum, the clear and present flooding danger that MRGO posed to the Lower Ninth and Parish not only was foreseeable to the Corps, it was *actually foreseen*. App.45a-74a, 105a-13a.

B. The LPV Project

Officially authorized by Congress in 1965,[1] App.5a, the LPV was designed to protect greater New Orleans and the Parish from flooding from a "Standard Project Hurricane"—i.e., "one having a frequency of once in about every 200 years," App.43a. A portion of the LPV, the Chalmette levee, ran along the southwestern bank of MRGO and was designed to protect the Lower Ninth and the Parish from the threat of hurricane flooding from the east, across Lake Borgne. App.79a. *See* Figure 2.

Although both MRGO and the LPV were designed, built, and maintained by the Corps, they were independent projects. They served different purposes, were authorized separately by Congress almost a decade apart, and had different funding sources and methods.

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[1] The process leading up to the authorization of the LPV actually began years earlier, when Congress authorized the Corps to study possible hurricane protection systems. App.42a.

In re Katrina Canal Breaches Consol. Litig., 577 F. Supp. 2d 802, 825 (E.D. La. 2008) ("*Robinson I*").[2] And, as noted, the projects covered different geographic areas: The LPV encircled much of the entire New Orleans metropolitan area, but only a relatively small portion of the LPV was located near MRGO.

While some of the material dredged during construction of MRGO was used to build part of the Chalmette levee, it is undisputed that the Corps did not design or construct the Chalmette levee or any other feature of the LPV with the goal or purpose of protecting the Polder against any perceived flood risk posed by MRGO. That is not surprising, since the Corps' official position was that MRGO did not pose any significant flood risk. *Robinson I*, 577 F. Supp. 2d at 815-16, 825 (noting Government's concession that Corps never took MRGO's effects into account in designing and constructing LPV levees). Similarly, the Corps did nothing to strengthen or otherwise alter the Chalmette levee's design to counter the mounting flooding threat created by the enormous widening of MRGO in the decades after its initial construction. As the undisputed testimony of Petitioners' expert demonstrated, there was "no evidence . . . that the LPV structures were bolstered in any way to withstand the obviously

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[2] As noted *infra*, pp.17-18, *Robinson* was litigation brought under the Federal Tort Claims Act ("FTCA") seeking to hold the United States liable for flooding caused by MRGO. *See also In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644 (E.D. La. 2009) ("*Robinson II*"), *aff'd in part*, *rev'd in part*, 696 F.3d 436 (5th Cir. 2012) ("*Robinson III*").

increasing threat" posed by MRGO's expansion. App.150a-51a. In short, the LPV was designed and maintained without regard for any flood risk posed by the construction and/or expansion of MRGO. The LPV and MRGO were independent projects; each would have been built whether or not the other ever existed.[3]

C. The Flooding Caused by MRGO

As the trial court found, by 2004 "the risk of injury by flooding was imminent." App.159a. "[T]he Army Corps no longer had any choice but to recognize that a hurricane inevitably would provide the meteorological conditions to trigger the ticking time bomb created by a substantially expanded and eroded MR-GO and the resulting destruction of wetlands that had shielded the [] Polder for centuries." App.176a-77a.

The risk of catastrophic flooding posed by MRGO became reality when Hurricane Katrina made landfall on August 29, 2005. Although the Polder is situated on some of the highest land in the area, it suffered "the most violent, spatially expansive and deepest flooding in the entire metro area . . . ." App.140a. The vast bulk of the water that flooded the Polder's populated areas came through extensive breaches in the Chalmette levee. *See* Figure 3; *see also* App.149a-50a, 201a-02a.

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[3] *See also Robinson I*, 577 F. Supp. 2d at 825 (Government's MRGO-related activities were "unrelated to a flood control project"); *Robinson III*, 696 F.3d at 448 ("The dredging of MRGO was not a flood-control activity, nor was MRGO so interconnected with the LPV as to make it part of the LPV.").

Indeed, the Government conceded that this source of water "was by far the greatest source of water that entered the [St. Bernard] polder, greatly exceeding all other sources." App.201a (emphasis omitted). "LPV floodwalls and levees failed" because they were "exposed to greater stress—the effect of higher surge and/or more damaging waves—for a longer period than would have occurred during Katrina if the MRGO project had never been built and maintained in the manner" it was. App.151a-52a. MRGO's wide fetch allowed powerful surge and waves to propagate and to quickly erode the Chalmette levee, causing early and catastrophic breaching. *See, e.g.*, App.32a, 150a-53a. The water flowing through these breaches led to the complete inundation of the Central Wetlands situated between the levees and developed areas of the Polder, the overtopping of the local levee known as the Forty Arpent, and the catastrophic flooding of communities in the Lower Ninth and the Parish. *See, e.g.*, App.148a-52a.

D. Litigation Over MRGO's Role in Polder Flooding

1. ***The* Robinson *litigation*.** As noted *supra*, at 15 n.2, this case was not the only litigation seeking to hold the Government liable for the flooding caused by MRGO. A portion of the district court's comprehensive opinion in the *Robinson* FTCA litigation found that "the Corps' failure to provide timely foreshore protection" of MRGO's banks foreseeably caused "the fatal breaching of the [Chalmette] Levee and the subsequent

catastrophic flooding of the St. Bernard Polder." *Robinson II*, 647 F. Supp. 2d at 697. Though the Fifth Circuit reversed, holding the Corps immune from tort liability, it praised the trial court's "impressive" rulings, and it did not question the court's finding that "a combination of erosion caused by MRGO . . . and destruction of wetland vegetation caused by increased salinity levels on account of MRGO's operation" led directly to the flooding of the Polder. *Robinson III*, 696 F.3d at 443, 446.

2. ***This litigation.*** Petitioners here, owners of property in the Parish and the Lower Ninth, filed this class action in the CFC in 2005, asserting that MRGO effected the taking of a flowage easement over their properties for which they were entitled to compensation. The CFC had jurisdiction under 28 U.S.C. § 1491(a)(1). Based on the voluminous record compiled in *Robinson*, much of which was admitted into evidence by the CFC, as well as the additional fact and expert testimony presented in two separate bench trials, the CFC found the Government liable for a temporary taking, App.28a, and awarded just compensation for a subset of exemplar properties, App.179a.[4]

In a 74-single-spaced-page opinion, the CFC painstakingly reviewed the evidence, much of which came from the Government's own studies and internal analyses, and faithfully analyzed the factors that this Court identified as germane to the takings analysis

[4] The CFC held the temporary taking lasted from August 28, 2005 (shortly before Katrina made landfall) until July 2009 (when MRGO was closed to navigation). App.169a.

in *Arkansas Game*. The court found that (1) it was foreseeable to, and *actually foreseen* by, the Corps that its MRGO-related activities would substantially increase the strength of storm surge and waves attacking the Chalmette levee in severe storms and thus would greatly increase the risk of catastrophic flooding, App.105a-13a; (2) "MR-GO induced substantially increased storm surge that caused catastrophic flooding on [Petitioners'] private property," App.177a; *see also* App.114a-52a; and (3) the resulting flooding on Petitioners' properties was substantial and severe, App.173a-75a. With respect specifically to causation, the CFC found that the "flooding of Plaintiffs' properties that occurred during Hurricane Katrina and subsequent hurricanes and severe storms was the direct result of the Army Corps' cumulative actions, omissions, and policies regarding the MR-GO that occurred over an extended period of time." App.160a. "[T]he flooding of Plaintiffs' properties," the CFC found, "was the 'direct, natural, or probable result' of the Army Corps' authorized construction, expansions, operation, and failure to maintain the MR-GO . . . ." *Id.*

The CFC entered a partial final judgment, App.269a, and the Government appealed.

E. The Federal Circuit's Decision

The Federal Circuit did not question the CFC's factual findings that the Corps' cumulative MRGO-related conduct—i.e., its "construction, expansions, operation, and failure to maintain" the channel, App.160a—caused the LPV's early failure and the resulting

catastrophic flooding of Petitioners' properties. Instead, the panel disaggregated the Corps' conduct into categories of "inaction" and "affirmative government acts," and then invented two new categorical rules to absolve the Government of takings liability.

First, seizing upon the CFC's finding that "the government's decisions not to armor the [MRGO's] banks and not to repair erosion along the banks caused the channel to widen, which allowed MRGO to 'carry significantly more water at higher velocities,'" App.9a (quoting App.130a), the Federal Circuit announced a categorical rule that "the government cannot be liable for failure to act, but only for affirmative acts," App.10a. The court thus held that "[t]he failure of the government to properly maintain the MRGO channel or to modify the channel cannot be the basis of takings liability." App.13a.

Second, noting that Petitioners were required to show that "absent government action, [they] would not have suffered the [flooding] injury," App.14a, the panel held that the CFC had "addressed the wrong question" in finding that "the plaintiffs' injury would not have occurred absent the construction and operation of the MRGO channel," App.16a-17a. Rather, the causation inquiry must "compar[e] the flood damage that actually occurred to the flood damage that would have occurred *if there had been no government action at all*," including not only MRGO *but also the LPV*. App.16a (emphasis added). Because Petitioners' flood damage from Katrina would have occurred if the Government

had never built the LPV in the first place, the court held "there was a failure of proof on the key issue of causation." App.27a. The court thus ruled that Petitioners could not establish causation because the Government had built the levees whose failure it later caused.

REASONS FOR GRANTING THE PETITION

The two new legal rules announced by the Federal Circuit find no support in the principles underlying the Takings Clause or in precedent, and indeed are in conflict with those principles and precedents. Given the Federal Circuit's unique and outsized appellate jurisdiction over cases seeking compensation for takings of property by the United States, this Court should grant certiorari in order to review whether the two new legal rules announced below comport with the critical constitutional protections accorded to property rights under the Fifth Amendment.

I. THE FEDERAL CIRCUIT'S CATEGORICAL "INACTION" RULE HAS NO BASIS IN LAW AND CONFLICTS WITH DECISIONS OF THIS COURT, THE FEDERAL CIRCUIT, AND OTHER CIRCUITS.

It is settled that the Government may effect a "taking by a continuing process of physical events." *Dickinson*, 331 U.S. at 749. *See also United States v.*

Kansas City Life Ins. Co., 339 U.S. 799, 809-10 (1950). In keeping with this venerable principle, the trial court found, and the Federal Circuit did not question, that the Corps' construction, operation, and failure to maintain MRGO foreseeably "set a chain of events into motion that substantially increased storm surge and caused flooding during Hurricane Katrina and subsequent hurricanes and severe storms." App.160a. And from the beginning of the project, the Government fully anticipated the chain of events that its decisions to construct MRGO and not to armor its banks would set in motion: saltwater intrusion from the Gulf would denude the surrounding landscape of its surge-retarding wetlands, and erosion from ship wakes would steadily expand the width of the channel.

The Government also fully understood the implications of these decisions for the future threat of flooding from hurricanes and severe storms. Indeed, by the 1980s, erosion of MRGO's banks had almost tripled the channel's original width, and the Corps worried internally about the serious and growing threat to the Lower Ninth and the Parish of "catastrophic damage," App.128a-29a, resulting from "direct hurricane attacks from Lake Borgne," App.121a-22a—exactly what happened two decades later. And although the Corps periodically considered remedial measures to mitigate the flooding threat—from "completely clos[ing]" MRGO to "reduce the possibility of catastrophic damage," App.128a-29a, to armoring the channel's banks to prevent further erosion—it consistently decided to do nothing. Instead, the Corps opted *as a matter of policy*

to allow the channel to continue widening and the flooding threat to continue growing along with it. App.110a.

The Federal Circuit's novel theory that takings liability cannot, as a matter of law, be predicated on such governmental "inaction" is patently untenable on its own terms. Consider a hypothetical case in which the Government undertook a construction project in the 1980s to triple MRGO's width from 650 feet to an average of 1,970 feet, *see* App.32a, and thus to greatly increase the risk that the Chalmette levee would fail to withstand the increased storm surge and waves from "direct hurricane attacks from Lake Borgne," App.121a. The Federal Circuit says, correctly, that such "affirmative" government acts "may form the basis for an inverse condemnation claim." App.12a. But here the Government did precisely the same thing: It undertook to construct a navigation channel with an average width of 1,970 feet. The only difference is that instead of widening it quickly by using construction equipment, the Corps widened it gradually by deliberately allowing it to erode over a 40-year period. The Government's deliberate decisions intentionally produced the same result in both cases, and there is no principled basis on which to distinguish them under the Takings Clause.

Far from a radical innovation in takings law, Petitioners' claim is an ordinary application of cause-and-effect: Whenever the Government deliberately engages in conduct that it *knows* will likely result in destruction of private property, it can avoid Fifth Amendment

liability by halting, reversing, or otherwise offsetting its original conduct, such that property rights are not disturbed. "Until taking, the condemnor may discontinue or abandon his effort." *Danforth v. United States*, 308 U.S. 271, 284 (1939). It is equally obvious that the difference between a permanent and a temporary taking is often the Government's failure to "abandon its intrusion or discontinue regulations." *First English*, 482 U.S. at 317. *See also United States v. Causby*, 328 U.S. 256, 267-68 (1946) (remanding for factfinding on whether taking of avigation easement was temporary or permanent).

1. The Federal Circuit's categorical inaction rule conflicts with a host of this Court's decisions, chief among them *Arkansas Game*, where this Court reminded the Federal Circuit that the Takings Clause calls on judges not to invent new "categorical rule[s]" foreclosing liability, but rather to "weigh carefully the relevant factors and circumstances in each case, as instructed by [this Court's] decisions." 568 U.S. at 36-37. Here, the CFC faithfully did just that.

The inaction rule also directly contradicts *Dickinson*, 331 U.S. 745, which held that "when the Government chooses . . . to bring about a taking by a continuing process of physical events," it must pay for all resulting damage to property rights. *Id.* at 749. The case involved a federal dam project. The Government admitted takings liability for the portion of the plaintiff's land that was permanently flooded, but it sought a categorical exclusion for land loss due to erosion. This Court rejected the argument, holding the Government

liable for "the resulting erosion which, as a practical matter, constituted part of the taking . . . ." *Id.* at 751. The Court further held that if the erosion "was in fact preventable by prudent measures, the cost of that prevention is a proper basis for determining the damage . . . ." *Id.* If the Government's payment of the amount it would have cost to prevent a taking is the appropriate remedy, it necessarily follows that the Government's actual implementation of those "prudent measures" would have avoided the Fifth Amendment violation in the first place. Taking action to prevent a taking and paying just compensation for the consequences of a failure to do so are merely two sides of the same coin.

The Federal Circuit cited *Sponenbarger*, 308 U.S. 256, in support of its inaction rule, but that decision supports Petitioners. *Sponenbarger* held that the Government does not commit a taking simply because it protects some lands from flooding but then "fails to or cannot protect" other land. *Id.* at 265. *Sponenbarger* thus rejected a challenge to the Government's simple failure to provide flood protection. But this case is about the Government's initial *creation* of a significant flood risk through its affirmative act of constructing a navigation channel, and its subsequent exacerbation of that risk by its deliberate failure to prevent the channel's inevitable expansion.

This Court's decisions outside the flooding context—including decisions the Federal Circuit relied upon below—confirm that a challenge to deliberate government action cannot be defeated simply by

characterizing as "inaction" the Government's later failure to mitigate the foreseeable effects of its action. For example, the challenges to permitting decisions in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), cannot be made to turn on whether they are characterized as challenges to the Government's "action" in denying a permit request or its "inaction" in failing to grant the request. *See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

2. The decision below also contradicts the Federal Circuit's own decision in *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003), which this Court favorably cited in *Arkansas Game*, 568 U.S. at 39. *Ridge Line* involved facts closely analogous to this case. The Government constructed a post office facility that caused increased storm runoff onto the plaintiff's land, forcing the plaintiff to build a water retention basin and other flood control facilities. 346 F.3d at 1351. Noting that the Government had "*fail[ed] to build* water retention facilities" itself, and had also "*failed to maintain* the check dam it built" to help protect the plaintiff's property, the court held that "the government effectively shifted some of its storm water control costs to" the plaintiff. *Id.* at 1358 (emphasis added). The court remanded for the CFC to consider these facts "and other evidence bearing on the reasonableness of the government's actions *(and inaction)* in order to decide whether [the plaintiff] has been deprived of a cognizable property interest." *Id.* (emphasis added). The Federal Circuit's holding here, that the combination of

government action and inaction cannot amount to a taking, squarely contradicts *Ridge Line*'s express direction that the CFC consider whether a combination of "actions (and inaction)" resulted in a taking.

3. The decisions of other circuits likewise contradict the decision below and illustrate how the panel's inaction rule can be manipulated to defeat meritorious takings claims. Consider *Lenoir v. Porters Creek Watershed District*, 586 F.2d 1081, 1084 (6th Cir. 1978), where the plaintiff alleged that defendants caused a taking when they (1) "negligently designed and constructed [a channel improvement] project so as to cause the flooding," and subsequently (2) failed "to maintain the channel projects . . . ." The Sixth Circuit held the plaintiff stated a takings claim because he alleged that his property was rendered useless for farming by this combination of *action* (the design and construction of the project) and *inaction* (the failure to maintain the channel projects, resulting in the deposit of sediment). *Id.* at 1094.

Similarly, in *United States v. Chicago, B. & Q.R. Co.*, 82 F.2d 131, 137 (8th Cir. 1936), the Government built a dam that, "absent expensive measures of protection, which were taken by" the landowner, would eventually cause environmental effects that would destroy the value of the plaintiff's land. The Eighth Circuit required compensation to the landowner for the cost of these protective measures. *Id.* at 137, 139. *See also Hernandez v. City of Lafayette*, 643 F.2d 1188, 1200 (5th Cir. 1981).

In sum, the Federal Circuit's inaction rule has nothing to commend it. It has no basis in the Constitution, is based on specious reasoning, contradicts decisions of this Court, the Federal Circuit, and other circuits, and provides the Government a potent tool to arbitrarily manipulate and defeat viable takings claims.

II. THE FEDERAL CIRCUIT'S CATEGORICAL CAUSATION RULE REQUIRING COURTS TO IGNORE THE ACTUAL CAUSE OF A TAKING HAS NO BASIS IN LAW OR PRECEDENT AND OFFENDS THE FUNDAMENTAL PURPOSE OF THE TAKINGS CLAUSE.

The Federal Circuit's categorical exclusion for government inaction did not dispose entirely of Petitioners' takings claim—it just jettisoned from the causation analysis the important causal role played by the Corps' consistent failure to armor or otherwise prevent the erosion of MRGO's banks. The panel was still faced with the Corps' indisputably "affirmative acts" found to have caused the flooding—i.e., the "construction of MRGO ... and [its] continued operation . . . ." App.14a. So to jettison the Corps' affirmative acts from the causation analysis, the court adopted a second categorical exemption.

1. We emphasize again that the Federal Circuit did not question the CFC's finding that the catastrophic flooding of Petitioners' properties "occurred because MRGO caused breaches in the levees." App.22a. That is, the CFC found that absent MRGO,

the LPV's Chalmette levee would have withstood Katrina's "direct hurricane attacks from Lake Borgne" long enough to prevent the inundation of Petitioners' properties. App.109a. But the Federal Circuit held that Petitioners and the CFC "addressed the wrong question." App.17a. It matters not at all, according to the panel, that Petitioners' properties would not have been flooded by Katrina if MRGO had never been built. The right question, the court held, is whether Petitioners' properties would have been flooded by Katrina *if the LPV had never been built. Id.*[5]

This question, obviously, is one the Government cannot lose, for if the very purpose of a government project is to protect an area from flooding caused by hurricanes or other natural forces, it will always be the case that the flooding would have occurred if the flood protection project did not exist at all. The Federal Circuit thus adopted the Government's view that it is categorically exempt, as a matter of law, from takings liability whenever a government flood control project fails, even if the Government's own intentional conduct, *unrelated to the flood control project*,[6] foreseeably

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[5] *See* App.17a (causation inquiry is "whether Plaintiffs' properties . . . would have flooded absent both MRGO and the LPV"); App.16a (Petitioners failed "to present evidence comparing the flood damage that actually occurred to the flood damage that would have occurred *if there had been no government action at all*" (emphasis added)); *see also* App.18a, 23a.

[6] Although the Federal Circuit suggested there was "relatedness" between the MRGO and LPV projects, App.22a, its decision that the LPV project must be removed from the but-for world in no way depended on any such supposed "relatedness." Indeed, for purposes of its causation analysis, the panel assumed the projects

caused the failure and resulting flooding. *See* Reply and Response Brief for the United States at 4 ("Congress was not required to authorize the construction of the LPV in the first place, and the LPV's failure to contain Hurricane Katrina's floodwaters—*whatever its cause*—is not a basis for federal takings liability." (emphasis added)).

The Federal Circuit's new causation standard has no basis in precedent or in principle, and if allowed to take root, it will only operate, as here, to take private property for public use without just compensation.

2. The only precedent of this Court cited in support of the Federal Circuit's remarkable causation rule is *Sponenbarger*. The plaintiff there owned land in the alluvial valley of the Mississippi River, where "floods . . . have with relentless certainty undermined the security of life and property." 308 U.S. at 260. After a devastating flood in 1927, Congress authorized a massive flood control project, but because the plan placed the plaintiff's land in the path of a proposed floodway in the project's levee system, her land would not be as fully protected from future flooding as other areas. The plaintiff brought a takings claim to recover the reduction in the value of her land allegedly attributable to the inevitable future flooding.

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were separate and distinct. *See, e.g.*, App.25a. That assumption was sound, as it is clear that the MRGO and LPV were separate, distinct, and independent projects, and that each project would have been built even if the other had not. *See supra* at 14-16.

This Court rejected the claim, holding that "[w]hen undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect." *Id*. at 265. As the Court reasoned, "[i]f major floods may sometime in the future overrun the river's banks despite—not because of—the Government's best efforts, the Government has not taken [the landowner's] property," because "[t]he Government has not subjected [the] land to any additional flooding, above what would occur if the government had not acted . . . ." *Id*. at 266.

Sponenbarger thus stands for the unexceptionable proposition that when the Government undertakes a public works project designed to protect a community from natural flooding hazards, but the project ultimately fails to do so *through no fault of the Government*, the Government is not liable under the Takings Clause. Because "the same floods and the same damages would occur had the Government undertaken no work of any kind," *id.* at 265, it cannot reasonably be said that the Government's unsuccessful effort to prevent the damage in fact caused the damage.

Sponenbarger says nothing, however, about the Government's potential takings liability when the Government itself, through separate intentional conduct having nothing to do with flood control, foreseeably causes the failure of a flood control structure. *Sponenbarger* would be relevant to the instant case only in a hypothetical world in which MRGO was never built, and the LPV and the

surrounding wetlands failed to restrain Katrina's floodwaters, resulting in catastrophic damage to Petitioners' properties. Only in that world would *Sponenbarger* absolve the Government of takings liability because the flooding damage to Plaintiffs' properties was no worse than it would have been had the Government not built the LPV in the first place.

But in the real world the Government *did* build the MRGO navigation channel; it did fail to protect its banks, allowing the 650-foot wide channel to expand through erosion to as much as 3,000 feet; it did fully understand that the ever-widening channel posed an ever-increasing flood risk from "direct hurricane attacks from Lake Borgne," App.109a; it did foresee, two decades before it actually happened, "the possibility of catastrophic damage to urban areas by a hurricane surge coming up" MRGO, App.128a-29a; and it did repeatedly consider taking action to protect against or mitigate the growing risk posed by MRGO of catastrophic flood damage, but consistently decided to do nothing. And in light of all these real-world facts, the trial court found that the Government's conduct caused the Chalmette levee to breach and Katrina's floodwaters to inundate the Polder as surely as if the Government had arbitrarily bulldozed the levee while the hurricane approached.

The Federal Circuit did not question any of these facts, but rather declared them irrelevant. A causation standard that requires courts to blind themselves to the *actual cause* of damage to private property obviously cannot be right.

3. The panel's categorical causation rule, like its categorical inaction rule, is also fundamentally inconsistent with this Court's admonition in *Arkansas Game* that courts should "weigh carefully the relevant factors and circumstances" of each taking case, rather than "resorting to blanket exclusionary rules." 568 U.S. at 36-37. One of the factors cited by *Arkansas Game*, the property owner's "reasonable investment-backed expectations," *id.* at 39, has special relevance in a case involving the failure of a federal flood control project. For it is almost always the case that communities develop and grow in reliance on such projects and in the reasonable expectation that the Government will not intentionally engage in some separate and independent conduct that foreseeably threatens to cause a catastrophic failure of the flood control project. Under the panel's causation rule, any such reliance, regardless of the facts, is in effect deemed *per se* unreasonable, because the Government's separate flood-protecting conduct is assumed out of existence for purposes of the causation analysis.

The panel's causation rule also conflicts with the causation analysis this Court employed in *Danforth*, 308 U.S. 271, which rejected a takings claim premised upon the alleged impact on the claimant's property of a new federal "set-back levee." *Danforth* acknowledged that a taking would result if the set-back levee's construction "put upon this land a burden, actually experienced, of caring for floods greater than it bore prior to [such] construction." *Id.* at 286. Of significance here, the Court addressed that question by assessing

whether the set-back levee would lead to increased flooding relative to a but-for world that included a *separate* "riverbank" flood control levee, and *not* whether it would lead to increased flooding relative to a world in which there were no flood protection levees at all. *Id.*[7]

The Federal Circuit's causation analysis is also in considerable tension with decisions in the analogous context of determining just compensation for property taken by the Government. In *United States v. Reynolds*, 397 U.S. 14, 16 (1970), this Court noted that "development of a public project may also lead to enhancement in the market value of neighboring land that is not covered by the project itself." The Court explained that "if that land is later condemned, *whether for an extension of the existing project or for some other public purpose*, the general rule of just compensation requires that such enhancement in value be wholly taken into account" and included in the award. *Id.* at 16-17 (emphasis added). In *Reynolds*, the project included the creation of a reservoir, and the value enhancement that would need to be included in the compensation award if it were determined that the

[7] Notably, although the riverbank levee was built by "local interests," its construction was partially funded by the United States, and it was built under the supervision of a commission created by federal statute, *see Danforth v. United States*, 105 F.2d 318, 319 (8th Cir. 1939), the Court did not suggest that the causation analysis required the removal of the riverbank levee from the but-for world, or an assessment of whether that levee would still have been constructed absent the federal legislation and funding that facilitated its creation.

subsequent condemnation was not within the project's original scope stemmed from "its economic potential as lakeside residential or recreational property," *id.* at 18, i.e., value that would not have existed *but for the project itself*. *See also United States v. Miller*, 317 U.S. 369, 376-77 (1943). Most recently, in *Horne v. Department of Agriculture*, 135 S.Ct. 2419, 2432 (2015), this Court rejected the argument that in assessing just compensation for the taking of raisins in connection with a federal marketing and price support program, a court must hypothesize about what the value of the raisins would have been if that program did not exist.

The Fifth Amendment thus entitles a property owner to compensation for any increase in value attributable to a government project that is separate and independent from the project that gave rise to the condemnation. *Accord United States v. Fuller*, 409 U.S. 488, 492-93 (1973) (Government "may not demand that a jury be arbitrarily precluded from considering as an element of value the proximity of [the condemned] parcel to a post office building, simply because the Government at one time built the post office").[8] It is very difficult to square this principle with the Federal Circuit's new causation standard, which requires the factfinder to pretend, for purposes of determining whether

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[8] *See also* 3 NICHOLS ON EMINENT DOMAIN § 8A.01[4] ("NICHOLS") ("When the condemnee's land is enhanced by reason of a government project, and this land is subsequently condemned for another unrelated project, the owner is entitled to recover the enhanced value brought about by the first project"); *accord id.* § 12B.17[4]; 26 AM. JUR. 2D *Eminent Domain* § 334 (2018).

a taking has even occurred, that such separate and independent government conduct never happened.

It is similarly hard to square the panel's causation standard with decisions holding that the Government is entitled to claim only "special" as opposed to "general" benefits stemming from projects for which it takes property. *See, e.g.*, *Bauman v. Ross*, 167 U.S. 548, 574 (1897) (Government entitled to offset when portion of property retained by condemnee "is specially and directly increased in value by the public improvement"); NICHOLS § 8A.02[4] (discussing distinction between special and general benefits). As the Federal Circuit held in *City of Van Buren v. United States*, 697 F.2d 1058, 1062 (Fed. Cir. 1983), when the Government does not satisfy its burden of identifying benefits "inuring specifically to the [property owner], rather than to the community at large," but instead relies only on "a listing of the public benefits that flow from nearly all flood control projects," the Government cannot defeat takings liability. If the Government is not entitled to a compensation credit for general public benefits attributable to the very project for which it takes property, it cannot point to the effects of *other* projects to defeat takings liability in the first instance.

The panel attempted to distinguish these authorities by noting they do not directly address causation. App.23a-24a. This distinction rings hollow, however, considering that the causation decisions on which the panel did rely themselves recognized the logical and jurisprudential relevance of these valuation issues and cited many of these precedents. *See, e.g.*, *Sponenbarger*,

308 U.S. at 267 n.13 (citing *Bauman*); *John B. Hardwicke Co. v. United States*, 467 F.2d 488, 490 (Ct. Cl. 1972) (relying on *Reynolds*). More fundamentally, as decisions like *Hardwicke* and *Van Buren* recognize, it makes sense that analyses of the role that other government projects/actions play in the just compensation analysis would also be relevant to assessing the role such projects may play in answering the antecedent question of whether a taking has occurred. At a minimum, the obvious relationship between the principles discussed in these decisions, and the obvious tension between those principles and the panel's new causation rule, underscore the need for this Court's review.

4. The radical nature of the panel's novel causation standard is also underscored by its lack of support in the lower court decisions cited by the panel. App.19a-20a. In *Hardwicke*, the Government built two dams as part of a *single* flood control project. It was thus unsurprising that the Court of Claims held that the effects of both dams must be assessed in determining whether the project *as a whole* had increased the natural flooding risk to which plaintiff's properties were previously exposed. 467 F.2d at 489-91. Similarly, the Federal Circuit's decision on remand in *Arkansas Game & Fish Commission v. United States*, 736 F.3d 1364, 1372 n.2 (Fed. Cir. 2013), noted in *dicta* that the proper comparison for determining the "scope of any invasion of property" would be between flooding that occurred prior to construction of a federal dam and flooding that occurred as a result of the operation of that *same* dam project. *Accord Ark-Mo Farms, Inc. v.*

United States, 530 F.2d 1384, 1386 (Ct. Cl. 1976) (noting absence of proof that single "project" was cause of flooding); *Cary v. United States*, 552 F.3d 1373, 1377 n.* (Fed. Cir. 2009) (where plaintiffs alleged that fire-suppression policies effected a taking, they could not ignore aspects of the *same* challenged policies that reduced fire risk).

5. In addition to its lack of support in, and indeed conflict with, relevant precedent, the panel's blanket causation rule would lead to extreme results, wholly incompatible with Fifth Amendment principles. Consider again the hypothetical case in which the Government affirmatively decided in the 1980s to triple MRGO's width, without making any corresponding modifications to the Chalmette levee to strengthen its ability to withstand the greatly increased flood risk posed by the modified MRGO in severe storms.[9] No principled understanding of takings law supports immunizing the Government from liability for flood

[9] In this scenario, the enlargement of the MRGO can be fairly described as a new Government project, and one that came after construction of the LPV. The decision below includes a footnote reading the Court of Claims' decision in *Hardwicke* as "suggest[ing]" that in certain circumstances, risk-reducing government actions, like the LPV, should not be removed from the but-for world in assessing causation when they precede risk-increasing actions. App.25a n.14. But the panel went on to express doubt regarding "[w]hether the [*Hardwicke*] approach is correct." *Id.* And the panel's rule that all projects directed at the risk posed by the challenged government project should be removed from the but-for world *regardless* of whether they were built independently of each other is impossible to logically square with any notion that the order in which the projects were built should make any difference.

damage that would foreseeably result in this scenario, but that is exactly what the panel's causation rule would require. Again, the only difference between this hypothetical and this case is that here, instead of widening MRGO quickly by using construction equipment, the Corps widened it gradually by deliberately allowing its banks to erode.

Moreover, under the panel's analysis, governments at all levels would essentially have a license to flood any private property located on land that had been reclaimed through government projects. Vast swaths of privately-owned and extremely valuable land (e.g., Boston's Back Bay, much of lower Manhattan, parts of the San Francisco waterfront and Chicago's Lake Michigan shoreline, and many neighborhoods in New Orleans itself) were previously submerged, but were reclaimed through governmental projects. If the same Government that reclaimed the land later caused it to flood through the operation of some independent project, however, it could not be found to have caused a taking under the decision below. After all, the owners of the flooded property would be in no worse position than they would have been if the Government had never reclaimed the formerly submerged land in the first place.

6. Finally, assuming that the purpose of causation analysis is to present a realistic view of the but-for world, the Federal Circuit's rule requiring removal from the but-for world of independent government projects would, in turn, necessitate numerous other adjustments to that but-for world in virtually every case.

The Federal Government does not operate in a vacuum, and its actions, including its decisions not to act, influence the actions of State and local governments and private citizens. In this case, for example, even leaving aside the role of projects such as the LPV in encouraging the reasonable reliance interests of citizens who purchased or developed property in the Lower Ninth and the Parish, if one assumes, contrary to the record below and common sense, that the LPV had never been built, it is likely that other actors would have stepped in to build flood control structures to protect properties from the natural flood risk that is a feature of life in Southeastern Louisiana. Thus, State, local, and private levees, such as the Forty Arpent, would almost certainly have been higher and stronger if there were no federal levees.

The decision below, which does not even address these complications stemming from its misguided new causation standard, would transform an already complex causation inquiry into a virtually impenetrable thicket of compounding hypotheticals regarding the actions, reactions, and decisions of numerous parties and nonparties over substantial periods of time. For this reason alone, the Court should grant certiorari to review whether the Fifth Amendment truly requires such a transformation and complexification of the analysis and litigation of takings claims.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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Respectfully submitted,

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