No. 18-359

IN THE

Supreme Court of the United States

ST. BERNARD PARISH GOVERNMENT, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR *AMICI CURIAE* CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, REASON FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, PROPERTY RIGHTS FOUNDATION OF AMERICA, NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, OWNERS' COUNSEL OF AMERICA, NATIONAL ASSOCIATION OF HOME BUILDERS, AND PROFESSORS JAMES W. ELY, JR., SHELLEY ROSS SAXER, AND ROBERT H. THOMAS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The **National Federation of Independent Business Small Business Legal Center** (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

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1. All parties' counsel were timely informed of *amici's* intent to file this brief, and all parties have consented to this filing. No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief.

Southeastern Legal Foundation (SLF) is a national nonprofit, public interest law firm and policy center that advocates individual liberties, limited government, and free enterprise. For 42 years, SLF has represented property owners challenging unconstitutional takings in state and federal courts.

The **Property Rights Foundation of America, Inc.**, founded in 1994, is a national, non-profit educational organization based in Stony Creek, New York, dedicated to private property rights.

The **National Association of Reversionary Property Owners** is a non-profit 501(c)(3) educational foundation whose primary purpose is to assist property owners in the education and defense of their property rights, particularly their ownership of property subject to right-of-way easements.

Owners' Counsel of America (OCA) is a network of the nation's most experienced eminent domain and property rights attorneys. They have joined together to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty. OCA members and their firms have been counsel for a party or *amicus* in many of the property cases this Court has considered in the past forty years, and OCA members have authored and edited treatises, books, and law review articles on property law.

The **National Association of Home Builders** (NAHB) is a federation of more than 700 state and local associations. NAHB's members frequently face state action that eliminates the economically viable use of their property, and it supports the application of the Fifth Amendment's Takings Clause to legislative, executive, and judicial action.

Professor **James W. Ely, Jr.**, is the Milton R. Underwood Professor of Law Emeritus at Vanderbilt University Law School. He is a renowned property rights expert whose career accomplishments were recognized with both the Brigham-Kanner Property Rights Prize and the Owners' Counsel of America Crystal Eagle Award in 2006. Professor Ely is the co-author of the leading treatise on the law of easements, *The Law of Easements and Licenses in Land* (revised ed. 2018), and is the author of *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3rd ed. 2008). Professor Ely also served as an editor of both the second edition of the *Oxford Companion to the Supreme Court*, and the second edition of the *Oxford Guide to Supreme Court Decisions*. This Court recently relied upon Professor Ely's scholarship in *Marvin M. Brandt Rev. Trust* v. *United States*, 572 U.S. 93, 96 (2014).

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Nelson, Dale Whitman, Colleen Medill, and Shelley Ross Saxer, *Contemporary Property* (4th ed. 2013).

Professor **Robert H. Thomas** is the Joseph T. Waldo Visiting Chair in Property Rights Law at William & Mary Law School where he teaches eminent domain and property rights. He has practiced eminent domain and takings law for more than thirty years. Professor Thomas was the Chair (2017-18) of the American Bar Association's Section on State & Local Government Law. He is the Hawaii member of Owners' Counsel of America and the Managing Attorney for the Pacific Legal Foundation Hawaii Center.

INTRODUCTION

The Fifth Amendment provides, "No person shall *** be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The "Takings Clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 31 (2012) (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)).

The U.S. Army Corps of Engineers (Corps) built a navigational canal that predictably and foreseeably flooded private property in St. Bernard Parish and New Orleans, Louisiana. The owners sought compensation for the value of the property the government flooded. The matter was extensively litigated in the U.S. District Court for the Eastern District of Louisiana, adjudicating

the government's tort liability, and the U.S. Court of Federal Claims (CFC), adjudicating the government's liability under the Takings Clause. See *In re Katrina Canal Breaches Consolidated Litigation*, 577 F. Supp.2d 802 (E.D. La. 2008) (*Robinson I*); *In re Katrina Canal Breaches Consolidated Litigation*, 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*); *St. Bernard Parish Government* v. *United States*, 121 Fed. Cl. 687 (2015) (App.28a) (*St. Bernard Parish I*), *rev'd* 887 F.3d 1354 (Fed. Cir. 2018) (App.1a) (*St. Bernard Parish III*). See also *St. Bernard Parish Government* v. *United States*, 126 Fed. Cl. 707 (2016) (*St. Bernard Parish II*) (decision regarding damages). The decisions of the district court and CFC were reviewed by the Fifth Circuit and the Federal Circuit, respectively.

The federal district court found "the callous and/or myopic approach of the Corps to the obvious deleterious nature of the MRGO[2] is beyond understanding." *Robinson II*, 647 F. Supp.2d at 666. The CFC found, "[w]eighing all the evidence in this case *** the Army Corps' construction, expansions, operation, and failure to maintain the MR-GO caused subsequent storm surge that was exacerbated by a 'funnel effect' during Hurricane Katrina *** causing flooding on Plaintiffs' properties that effected a temporary taking ***." *St. Bernard Parish I*, 121 Fed. Cl. at 746 (App.176a).

A panel of the Federal Circuit overturned the CFC's legal conclusions and excused the federal government from its constitutional obligation to compensate these owners.

2. Mississippi River-Gulf Outlet, also abbreviated as MR-GO.

The Federal Circuit did so because it believed "[t]akings liability must be premised on affirmative government acts. The failure of the government to properly maintain the MRGO channel or to modify the channel cannot be the basis of takings liability." *St. Bernard Parish III*, 887 F.3d at 1362 (App.13a).

This Court should grant the petition for certiorari and reverse the Federal Circuit's decision because the Federal Circuit's decision is contrary to this Court's Takings Clause jurisprudence, conflicts with the Federal Circuit's own precedent, conflicts with how state courts apply the Takings Clause in similar cases, and upends settled principles of property law.

STATEMENT OF THE CASE

Beginning in the 1950s, Congress directed the Corps to construct the MRGO navigational canal. The Corps' design, construction, and operation of MRGO destroyed natural wetlands that had historically protected the St. Bernard Polder from hurricane storm surge. MRGO destroyed these protective wetlands by introducing salt-water from the ocean. As MRGO's banks eroded, the channel became substantially wider, allowing more water to pass through at higher velocities. The originally-designed 650-foot-wide channel for ocean-going vessels widened through unabated erosion to a half-mile-wide channel by the 1980s. The Corps' failure to maintain MRGO further compounded the Corps' flawed design and construction of MRGO. MRGO created a funnel-effect, focusing and intensifying a storm surge approaching the St. Bernard Polder. The Corps' design and construction of MRGO and the Corps' failure to maintain the MRGO navigational canal was equivalent to loading a gun,

pointing it at the St. Bernard Polder, and waiting for a hurricane to pull the trigger.

The CFC found the Corps knew as early as 1959 that armoring MRGO's banks "was required to prevent erosion of the MR-GO's banks ***." *St. Bernard Parish I*, 121 Fed. Cl. at 721 (App.107a). The court further found the Corps knew that this continued erosion would breach the bank along Lake Borgne, which would expose the "communities in which Plaintiffs' properties are located *** to direct hurricane attacks from Lake Borgne." *Id.* at 722 (App.109a). In addition to deciding not to armor the banks to prevent erosion, the Corps decided to acquire easements over the eroded land by eminent domain. *Id.* at 721 (App.107a-108a). The court found that "[b]etween 1964 and 1996, 5,324 additional acres of marsh adjacent to the MRGO were lost," requiring the government to condemn the eroded marshland. *Id.* (App.108a).

The Corps also refused to close MRGO despite statements in its own reports that doing so 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*." *St. Bernard Parish I*, 121 Fed. Cl. at 729 (App.128a-129a) (emphasis added).

The CFC found 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." *St. Bernard Parish I*, 121 Fed. Cl. at 741 (App.160a) (emphasis added). After considering extensive testimony and evidence presented in both the CFC and the

district court, the CFC concluded, "the Army Corps set a chain of events into motion that substantially increased storm surge and caused flooding during Hurricane Katrina and subsequent hurricanes and severe storms." *Id.*

The Federal Circuit recognized that the CFC found the catastrophic flooding of these landowners' property "occurred because MRGO caused breaches in the levees." *St. Bernard Parish III*, 887 F.3d at 1365-66 (App.22a). Thus, had the Corps not constructed MRGO and had the Corps not failed to maintain MRGO, the Chalmette levee would have withstood Katrina's "direct hurricane attacks from Lake Borgne," and these owners' land would not have flooded. *St. Bernard Parish I*, 121 Fed. Cl. at 722 (App.109a-110a).

The Federal Circuit did not disturb the extensive factual findings and conclusions upon which the CFC and district court premised their decisions. The CFC found:

> Weighing all the evidence in this case, the court has determined that Plaintiffs established that the Army Corps' construction, expansions, operation, and failure to maintain the MR-GO caused subsequent storm surge that was exacerbated by a "funnel effect" during Hurricane Katrina and subsequent hurricanes and severe storms, causing flooding on Plaintiffs' properties that effected a temporary taking under the Fifth Amendment to the United States Constitution.
>
> *St. Bernard Parish I*,
> 121 Fed. Cl. at 746 (App.176a).

The CFC and district court found the Corps' design, construction, and operation of MRGO would substantially increase the likelihood these owners' properties in St. Bernard Polder would flood. See *St. Bernard Parish I*, 121 Fed. Cl. at 720-38 (App.105a-152a) (discussing the history of MRGO since 1958, including the repeated studies and warnings that the construction and operation of MRGO significantly increased the risk that privately-owned land would flood).

The district court similarly found:

> [I]t is clear from the testimony and documentary evidence that the Corps knew at least from the early 1970's that the MRGO was endangering the Chalmette Unit Reach 2 Levee. It knew that a primary source of the devastating shoaling was as a result of the wave wash that occurred with each ship that navigated the channel. *** As to the north shore, the callous and/or myopic approach of the Corps to the obvious deleterious nature of the MRGO is beyond understanding.
>
> *Robinson II*,
> 647 F. Supp.2d at 665-66.

The Fifth Circuit rejected the government's argument that the United States was immune from liability because the construction and operation of MRGO was a "flood-control" project. The MRGO navigation canal was not a flood-control project. The Fifth Circuit held, "the negligently maintained MRGO acted upon the levees in a way that caused them to be breached during Hurricane Katrina, and, because MRGO was not a flood-control project and was separate from the [Lake Pontchartrain

and Vicinity Hurricane Protection Plan], no immunity should attach under Section 702c." *Robinson III*, 673 F.3d at 446.

SUMMARY OF ARGUMENT

This Court should grant the landowners' petition for certiorari because Judge Dyk's opinion for the Federal Circuit panel adopted two novel exclusionary rules that are contrary to this Court's Takings Clause jurisprudence. See *Arkansas Game*, 568 U.S. at 34 ("No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case."). Judge Dyk's opinion improperly side-stepped this Court's unanimous holding in *Arkansas Game*.

The Federal Circuit's *action* versus *inaction* dichotomy is also contrary to the Federal Circuit's own precedent and is contrary to how state courts apply the Takings Clause in similar flooding cases.

This Court should also grant certiorari because the Federal Circuit is a court of national jurisdiction hearing *every* appeal of *every* inverse condemnation claim against the United States. The Federal Circuit's decision undermines existing property rights and crafts a new and novel paradigm (the supposed *action* versus *inaction* analysis) and unsettles established Takings Clause jurisprudence nationally.

ARGUMENT

A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury.

John Stuart Mill,
On Liberty (1859), p. 17

I. The Federal Circuit adopted a paradigm contrary to this Court's Takings Clause jurisprudence.

This Court has long-held government-induced flooding of private property, even if seasonal or temporary in duration, is a compensable taking for which the Fifth Amendment compels the government to justly compensate the landowner. See, *e.g.*, *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 181 (1871) ("where real estate is actually invaded by superinduced additions of water *** so as to effectually destroy or impair its usefulness, it is a taking); *United States* v. *Lynah*, 188 U.S. 445, 470 (1903) ("where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th Amendment"); *United States* v. *Grizzard*, 219 U.S. 180, 184 (1911) ("If, as the court below found, the flooding and taking of a part of the plaintiff's farm has depreciated the usefulness and value of the remainder, the owner is not justly compensated by paying for only that actually appropriated, and leaving him uncompensated for the depreciation over benefits to that which remains."); *United States* v. *Cress*, 243 U.S. 316, 328 (1917) (quoting and following *Lynah*, 188 U.S. at 470); *United States* v. *Dickinson*, 331 U.S. 745, 750 (1947) ("When it takes property by flooding, it takes the

land which it permanently floods as well as that which inevitably washes away as a result of that flooding."); *Arkansas Game*, 568 U.S. at 27 ("recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability").

The Federal Circuit, however, excused the government from its obligation to justly compensate these St. Bernard Parish and New Orleans landowners because it wrongly believed that the government's lack of "direct action" somehow relieved the government of its constitutional obligation to compensate these landowners. The Federal Circuit's *action* versus *inaction* dichotomy is unworkable, is contrary to established Takings Clause jurisprudence, and is flatly contrary to this Court's recent decision in *Arkansas Game*.

Judge Dyk's opinion attempts to reformulate a blanket exclusionary rule for takings liability this Court unanimously rejected in *Arkansas Game*. 568 U.S. at 37 ("Flooding 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.").

Judge Dyk's opinion reiterates the reasoning this Court unanimously rejected in *Arkansas Game*. In the Federal Circuit's *Arkansas Game* decision, Judge Dyk wrote, "[h]owever, *cases involving flooding and flow-age easements are different*. *** An injury that is only 'in its nature *indirect* and consequential,' *i.e.* a tort, cannot be a taking." *Arkansas Game & Fish Comm'n* v. *United States*, 637 F.3d 1366, 1374 (Fed. Cir. 2011), *rev'd* 568 U.S. 23 (2012) (emphasis added).

This Court categorically rejected Judge Dyk's proposition in *Arkansas Game* and held, "[n]o decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case." *Arkansas Game*, 568 U.S. at 34.

Judge Dyk's supposition that "inaction" absolves the government of responsibility recalls this Court's repudiation of the criminal's argument that he cannot be found guilty even though he loaded the gun, pointed it at his victim, and pulled the trigger because "pulling the trigger on a gun is not a use of force because it is the bullet, not the trigger, that actually strikes the victim." *United States* v. *Castleman*, 572 U.S. 157, 171 (2014) (internal quotation omitted).

The panel's decision also conflicts with the Federal Circuit's own precedent. In *Owen* v. *United States*, 851 F.2d 1404, 1405 (Fed. Cir. 1988) (en banc), the Federal Circuit reversed the dismissal of a landowner's inverse condemnation claim where the Corps dredged a river in order to improve navigation. The changed shape of the river caused the adjacent land to erode and resulted in the owner's home toppling into the river. The Corps did not remove the soil under the owner's home, nor did it intend to do so, and in fact, there was no "allegation that the Corps itself invaded" the owner's land. *Id.* at 1407. Rather, "erosion resulting from the increased velocity" of the river eventually removed the soil. *Id.*

The Federal Circuit in *Owen* held the Corps' "actual construction equipment or work need not directly encroach upon the property in question before a taking by the government can be deemed to have occurred." 851 F.2d at 1411-12 (citing *United States* v. *Causby*, 328 U.S. 256 (1946)).

The Federal Circuit "reject[ed] the offered view that no compensation can ever be owed for the consequential effects of construction activities to further navigation ***." *Id.* at 1412. The court reaffirmed its past precedent, explaining, "it is not the location of the *cause* of the damage that is relevant, but the location and permanence of the *effect* of the government action causing the damage that is the proper focus of the taking analysis." *Id.* (citing *Tri-State Materials Corp.* v. *United States*, 550 F.2d 1, 4 (Ct. Cl. 1977), *Cress*, 243 U.S. at 316, and *Goose Creek Hunting Club, Inc.* v. *United States*, 518 F.2d 579, 583 (Ct. Cl. 1975)) (emphasis in original).

In *Richard* v. *United States*, the Federal Circuit's predecessor (the U.S. Court of Claims) held the federal government liable for a taking when water from a government irrigation and flood-control canal raised the groundwater level and destroyed an adjoining landowner's orange grove. 282 F.2d 901, 904 (Ct. Cl. 1960). The court held:

> [I]t is not necessary to show that the [government] intended to take plaintiff's land; all that plaintiff need show is that the taking of its land was the *natural and probable consequence of the acts of the [government].* It is not even necessary for plaintiff to show that [the government] was aware of the taking of an interest in its property would naturally result from its acts. It is only necessary to show that this was in fact the natural and probable consequence of them.
>
> *Id.*[3]

3. Citing *Cotton Land Co.* v. *United States*, 109 Ct. Cl. 816, 831-32 (1948) (emphasis added).

The Court of Claims found the government responsible for a taking when the flooding (or raising the water table) was "the natural and probable consequence[ ]" of the government's action. *Richard*, 282 F.2d at 904. "We must hold that plaintiffs' injury was the natural consequences of defendant's act." *Id.* See also *Barnes* v. *United States*, 538 F.2d 865, 871-72 (Ct. Cl. 1976) (owner "need not allege or prove that [the government] specifically intended to take property. There need be only a governmental act, the natural and probable consequences of which effect such an enduring invasion of plaintiffs' property as to satisfy all other elements of a compensable taking.") (action involving permanent, intermittent flooding where Corps foresaw that river delta growth would be a factor to consider in evaluating the impact of water release from dams).

So too 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. In *Ridge Line*, the government built a facility that increased stormwater runoff onto adjoining land, and the government failed to build stormwater retention basins and dams. 346 F.3d at 1351. The Federal Circuit remanded this case to the CFC to consider whether the government's inaction (*i.e.*, the government's failure to build these mitigating structures) deprived the adjoining landowners of a "cognizable property interest." *Id.* at 1358.

II. The Federal Circuit's *action* versus *inaction* dichotomy is contrary to established Takings Clause jurisprudence as followed by state courts.

In *Pumpelly*, *Grizzard*, *Cress*, *Dickinson*, *Arkansas Game*,[4] and other cases, this Court has held the government's flooding of private property is a compensable taking for which the Fifth Amendment compels the government to justly compensate the landowner. Several state courts hold that when the government floods private property through *inaction*, it is a taking for which the Fifth Amendment compels the government to compensate the landowner. This is so even when the government *inadvertently* floods an owner's land. Decisions by state courts in Maryland, California, Florida, New Mexico, and Arkansas demonstrate this point.[5]

In *Litz* v. *Maryland Department of the Environment*, 131 A.3d 923, 931 (Md. 2016), the Maryland Court of Appeals held an owner may allege inverse condemnation based upon the government's "failure to act, in the face of an affirmative duty to act."

Gail Litz owned a campground recreational lake. Litz lost her campground business and her property when sewage polluted the lake. *Id.* at 926. The Maryland Court of Appeals held the government entities (Maryland and the town of Goldsboro) responsible for taking Litz's land because the city and state knew about the sewage overflow but did nothing to avert the contamination. *Id.* The government argued it was absolved of liability because

4. See, *supra*, pp. 11-12.

5. We could add others, but space prohibits us from doing so.

the sewage was the result of acts by third parties and not direct action by the government. *Id.* at 927. The Maryland Court of Appeals rejected this argument.

Noting that this taking didn't "fit[ ] neatly within conventional thinking about inverse condemnation" because Litz's "allegations focus predominately on the inaction of [the government], rather than any affirmative action by [the government] parties," and that Maryland law was silent on the question, the court looked to other states.[6] *Id.* at 931. The Maryland Court of Appeals followed Florida and California and expressly adopted the reasoning of the California Court of Appeals in *Arreola* v. *County of Monterey*, 122 Cal. Rptr.2d 38 (Cal. Ct. App. 2002), and the Florida Court of Appeals in *Jordan* v. *St. Johns County*, 63 So.3d 835 (Fla. Ct. App. 2011).

In *Arreola*, the California court held that state and local governments must pay an owner when the government floods the owner's property. 122 Cal. Rptr.2d at 44-45. In 1949, the Army Corps of Engineers constructed the Pajaro River Levee Project under the federal Flood Control Act of 1944. *Id.* at 45-56. The project built levees along and channeled the Pajaro River. *Id.* The Corps then stepped out of the project and turned operation over to the California local governments. *Id.* at 46.

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6. Maryland's takings clause "has been determined to 'have the same meaning and effect in reference to an exaction of property, and that the decisions of the Supreme Court on the Fourteenth Amendment are practically direct authorities.'" *Litz*, 131 A.3d at 930 (quoting *Bureau of Mines of Maryland* v. *George's Creek Coal & Land Co.*, 321 A.2d 748, 755 (Md. 1974)).

The Corps gave the California local government entities a manual to manage the project. *Id.* The Corps' manual directed the river channel to be cleared of vegetation and shoals. *Arreola*, 122 Cal. Rptr.2d at 46. For twenty-three years, the state and local governments maintained the channel as directed. But, in 1972, the California Fish and Game Department halted further clearing of the channel to protect animal habitats. *Id.* Sediment and vegetation began clogging the channel. *Id.* at 46-47. California's failure to maintain the channel caused stormwater to overtop the levees and flood the adjoining owners' land. *Id.* at 49.

Arreola held that flooding landowners' private property is a compensable taking when "the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement." 122 Cal. Rptr.2d at 53 (quoting *House* v. *Los Angeles County Flood Control District*, 153 P.2d 950, 956 (Cal. 1944) (Traynor, J., concurring)).[7]

In *Arreola*, the court held that because the counties "*made the deliberate calculated decision* to proceed

7. In *House*, the California Supreme Court held the government must compensate owners when it "removed a safe and secure protection to [House's] land immediately adjacent thereto and substituted therefor an unsafe, careless and negligently planned bank or wall, resulting in the overflow, inundating and washing away of her property ***." 153 P.2d at 953. See also *Butte Fire Cases*, 2018 WL 3371780, *2 (Cal. Super. Ct. April 26, 2018) (holding inverse condemnation liability applies when a utility failed to follow fire safety management practices in constructing and maintaining its power lines, resulting in wildfire).

with a course of conduct, in spite of a known risk, just compensation will be owed." 122 Cal. Rptr.2d at 53 (emphasis added). The court concluded, "in order to prove the type of governmental conduct that will support liability in inverse condemnation it is enough to show that the [government] entity was aware of the risk posed by its public improvement and deliberately chose a course of action – *or inaction* – in the face of that known risk." 122 Cal. Rptr.2d at 55 (emphasis added).

Florida, likewise, holds the government is obligated to compensate landowners for taking private property when either inaction or unintended consequences of government action cause the owner to lose his property.

In *Jordan* v. *St. Johns County*, 63 So.3d 835 (Fla. Ct. App. 2011), private landowners lived along a county highway. The county no longer maintained the road, and the owners lost access to their property when the road became impassible. *Id.* at 839. The court held "governmental inaction – [failure to maintain the road] in the face of an affirmative duty to act – can support a claim for inverse condemnation." *Jordan*, 63 So.3d at 839 (citing *Palm Beach County* v. *Tessler*, 538 So.2d 846, 849 (Fla. 1989)).

New Mexico similarly holds the government must compensate an owner when "the risk of damage to the owner's property is actually foreseen by the governmental actor, or in which it is so obvious that its incurrence amounts to the deliberate infliction of harm for the purpose of carrying out the governmental project." *Electro-Jet Tool & Manufacturing Co.* v. *Albuquerque*, 845 P.2d 770, 777 (N.M. 1992).

In *Electro-Jet*, the City of Albuquerque built and improperly maintained a stormwater-drainage system adjacent to Electro-Jet's buildings. *Id.* at 771. The city's failure to maintain its drainage ditches caused Electro-Jet's buildings to settle. *Id.* Because Electro-Jet failed to "allege any *action* by the City amounting to a *deliberate* *** damaging of its property by the City," the court dismissed Electro-Jet's action. *Id.* at 773 (emphasis added). But, importantly, the court held that if Electro-Jet were to allege the city "proceeded to permit water to pond in the drainage ditches" and was aware that the resulting seepage of the water into the soil could damage Electro-Jet's buildings, the city would be liable for a taking. *Id.* at 779.

The Arkansas Supreme Court held the government must compensate an owner when an owner's home was devalued by sewage backing-up into the home due to the city's failure to properly operate its sewage pumps. *Robinson* v. *City of Ashdown*, 783 S.W.2d 53, 54 (Ark. 1990). The city argued it only needed to compensate the owner when the government "purposely engaged in an endeavor that caused damage to various landowners." *Id.* at 56. The government argued it needn't compensate owners when the government acted "indirectly" or through third parties.

In *Robinson*, the court held that, when the government "acts in a manner which substantially diminishes the value of a landowner's land" – the action here being the city's *failure* to properly pump sewage – "and its actions are shown to be intentional, it cannot escape its constitutional obligation to compensate for a taking of property on the basis of its immunity from tort action." 783 S.W.2d at 56-57.

III. The Federal Circuit has national jurisdiction over every inverse condemnation action against the United States.

The Federal Circuit is a court of national jurisdiction hearing *every* appeal of *every* inverse condemnation taking case against the United States.[8] See 28 U.S.C. 1295(a).

When the United States floods an owner's property, the Fifth Amendment compels the Government to pay the owner just compensation. This has been settled law since before 1872. See *Pumpelly*, 13 Wall. at 181, and collected cases, *supra*, pp. 11-12.

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8. As this Court has explained, "[t]here are important legal and practical differences between an inverse condemnation suit and a condemnation proceeding." *United States* v. *Clarke*, 445 U.S. 253, 255 (1980). "[A] 'condemnation' proceeding is *** an action brought *by* a condemning authority *** in the exercise of its power of eminent domain." *Id.* (emphasis in original). Inverse condemnation "shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation." *Id.* See also *First English Evangelical Lutheran Church of Glendale* v. *Los Angeles County*, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."); *Dickinson*, 331 U.S. at 747-48 ("The Government could, of course, have taken appropriate proceedings, to condemn *** both land and flowage easements. *** The Government chose not to do so. It left the taking to physical events, thereby putting on the owner the onus ***."). Here, the government has denied liability for the taking and shifted to these owners the burden of affirmatively proving the government's liability and the amount of compensation they are owed.

The Federal Circuit's decision undermines this constitutional guarantee. And, because the Federal Circuit has exclusive national jurisdiction of every inverse condemnation action against the United States, there is heightened need for this Court to review Federal Circuit decisions when the Federal Circuit announces a novel rule of national sweep.

The Federal Circuit's *action* versus *inaction* dichotomy is a new lens through which to view private property rights and the Takings Clause. Judge Dyk's opinion undermines existing property rights and attempts to craft a novel argument by which the government may escape its constitutional obligation to justly compensate owners when it takes their property. This unsettles existing property interests and expectations.

"A venerable legal principle stresses the importance of reliance interests when dealing with property rights." Bryan A. Garner, *et al.*, *The Law of Judicial Precedent* (2016), p. 421. Garner, *et al.*, point out that in *Marine Ins. Co. of Alexandria* v. *Tucker*, 3 Cranch 357, 388 (1806), this Court stated, "in questions which respect the rights of property, it is better to adhere to principles once fixed *** than to unsettle the law in order to render it more consistent with the dictates of sound reason."[9] What makes the Federal Circuit's decision so unsettling is that it is not even consistent with sound reason.

9. See also *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 687-88 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.").

CONCLUSION

This Court should grant these Louisiana landowners' petition for certiorari because the Federal Circuit's decision is contrary to this Court's Takings Clause jurisprudence.

Even more important than the errors in the Federal Circuit's flawed legal analysis and its failure to heed this Court's decisions is the mischief and injustice the Federal Circuit's decision will wreak upon not only these Louisiana landowners, but also upon *all owners* whose property is taken when the federal government floods private property.

Moreover, establishing and affirming this Court's jurisprudence on Fifth Amendment takings is necessary to guide lower courts in numerous current and future flooding cases. See, *e.g.*, *In re Addicks & Barker Flood-Control Reservoirs*;[10] *Ideker Farms, Inc.* v. *United States*;[11] *Big Oak Farms, Inc.* v. *United States*.[12] Providing the lower courts and litigants clear direction is essential to justly and efficiently resolve all owners' claims. The Federal Circuit with its novel and amorphous *action* versus *inaction* dichotomy has greatly muddied the waters in flooding cases.

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10. No. 1:17CV3000 (Court of Federal Claims Hurricane Harvey litigation).

11. No. 1:14CV183 (Court of Federal Claims six-state Missouri River flooding litigation) (case stayed pending this Court's consideration of the *St. Bernard Parish* petition for certiorari).

12. No. 1:11CV275 (Court of Federal Claims Mississippi River flooding litigation).

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