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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The Rule 29.6 Statement in the petition for writ of certiorari remains accurate.

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INTRODUCTION

The Government's brief in opposition, despite a determined effort to befog this case with distracting irrelevancies, only highlights the radical nature of the Federal Circuit's takings analysis.

First, the Government does not deny that, at its urging, the court below adopted two novel categorical rules, exempting the Government from takings liability in flooding cases whenever flooding is caused by either (1) government conduct that can be characterized as "inaction" or (2) the failure of a flood control structure to prevent flooding, even if the Government's own separate conduct, unrelated to flood control, foreseeably caused the structure's failure. As we have emphasized, Pet.1-2, 24, 33, these new rules are in open defiance of this Court's unequivocal *unanimous* instruction 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." *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 37 (2012) (quotation marks omitted).

The Government's answer to this point is total silence; its opposition (like the opinion below) does not even mention *Arkansas Game*'s disapproval of categorical exemptions from takings liability, let alone attempt to reconcile it with the decision below. The panel's unexplained, and inexplicable, departure from *Arkansas Game* alone suffices to warrant review here. Indeed, it justifies summary reversal.

Second, the Government likewise offers no substantive response to our arguments challenging the panel's holding that "the government cannot be liable for failure to act, but only for affirmative acts…." App.10a. Instead, the Government dismisses the Federal Circuit's categorical "inaction" rule as merely an "alternative ruling [that] has no practical consequence…." Opp.15. The Government thus effectively concedes that the panel erred in concluding that the Takings Clause is blind to a claim, like Petitioners', that the Government is responsible for flood damage that results when it deliberately declines to take available steps to mitigate the foreseeable flood risk stemming from its own intentional *actions* (here, the construction and gradual widening of MRGO).

Third, the Government essentially rests its opposition on a defense of the other blanket exclusionary rule that it successfully urged below: namely, that in a takings case seeking recovery for flood damage resulting from the failure of a federal flood control structure, the sole causation inquiry is whether the flooding would have occurred if the Government had not built the flood control structure in the first place. As demonstrated in the petition, and not disputed in the opposition, it matters not under this causation standard *why* the flood control structure failed; even if the Government's own intentional conduct foreseeably caused that catastrophic failure (as the CFC found here), the inquiry remains simply whether the flood damage would have occurred in the absence of the structure. Nor does the Government dispute that this inquiry is one it cannot lose. After all, if the purpose of a

structure is to protect an area from the risk of flooding from storms or other natural forces, it will always be the case that any flooding resulting from the structure's failure would have occurred if the structure never even existed.

ARGUMENT

1. a. Because the Government places almost all its chips on its defense of the panel's categorical causation standard, we begin there. The Government bases its argument on a series of legal and factual postulates that are unobjectionable in the abstract. "[T]here is no constitutional right to government protection from flooding." Opp.10. We agree. "The government had no obligation to construct the LPV in the first place…." Opp.8-9. This is also true. "[Petitioners'] properties would have experienced the *same or greater* flooding from Hurricane Katrina if the Corps had not built the LPV." Opp.9. We do not dispute this proposition either. But it does not invariably follow from these postulates, contrary to the Government's assertion, that "[a] takings claim therefore does not lie." *Id.*

To be sure, a takings claim will not lie in most, perhaps the vast majority, of cases in which flooding results because a federal levee or other flood control structure fails to subdue the forces of nature.[1] That is the teaching of *United States v. Sponenbarger*, 308

[1] The Government emphasizes that the certified class covers approximately 30,000 properties, Opp.5, but this fact underscores the limited nature of Petitioners' takings claim: it involves only a relatively small portion of the New Orleans area devastated by Katrina and an even smaller percentage of the one million residents displaced by the storm. *See* C.A. App. 30,776.

U.S. 256 (1939), the *sole* decision of this Court on which both the Government and Federal Circuit rely.

Sponenbarger, which we have discussed at length, Pet.30-32, stands for the unexceptionable proposition that the Government is not liable under the Takings Clause when a public works project designed to protect a community from natural flooding ultimately fails to do so "despite—not because of—the Government's best efforts…." 308 U.S. at 266. In such a case, *where the only relevant government conduct is its construction of a flood control project*, it is fair to ask whether "the same floods and the same damages would occur had the government undertaken no work of any kind." *Id.* at 265. Put another way, in hypothesizing the "but for" world in such a case, the question is whether the Government's construction of the flood control structure "subjected [the] land to any additional flooding, above what would occur if the Government had not acted" to build the structure. *Id.* at 266. And if the answer is "no," as it invariably will be in a case where, again, the only government conduct at issue is the construction of the flood control project, then it cannot reasonably be said that the Government's unsuccessful effort to *prevent* flood damage in fact *caused* that damage.

But *Sponenbarger* says nothing about the Government's liability when *the Government itself, through intentional conduct separate from and independent of the flood control project, foreseeably causes that project's failure.* In contrast to *Sponenbarger*, the government conduct in such a case is not only its construction of a flood control structure (here, the LPV), but also its separate conduct, entirely

independent of the flood control project (here, the construction and gradual widening of MRGO), that has been found (as here) to have foreseeably caused the structure's failure.

In determining causation in such a case, it is patently contrary to the interests of "fairness and justice" animating the Takings Clause, *Armstrong v. United States*, 364 U.S. 40, 49 (1960), to ignore the Government's role in causing the flood control structure's failure and simply to ask, as in *Sponenbarger*, whether the flood damage would have occurred if the Government had never built the structure. Rather, the correct causation inquiry is whether the flood damage would have occurred even absent—*i.e.*, but for—the government conduct that caused the flood control structure to fail.

The Government has no answer to all this. It simply ignores the glaring, inconvenient fact that in this case, unlike *Sponenbarger*, the Government itself, as a result of its intentional conduct having nothing to do with flood control, foreseeably caused the flood control structure's failure to prevent flood damage. This fact is at the heart of the causation question.

b. The Government questions "whether any circumstances could exist in which flooding driven by a hurricane could be deemed a taking...." Opp.8. And it asserts that "it would be neither fair nor just" to impose takings liability for flood damage resulting from the failure of a federal levee system to contain such floodwaters. Opp.11. But *Arkansas Game* rejected, unanimously, precisely this absolutist approach, in recognition of "the nearly infinite variety of ways in which government actions or regulations

can affect property interests…." 568 U.S. at 31. Would it be "neither fair nor just" to impose takings liability if the Government had arbitrarily bulldozed the Chalmette levee as Katrina approached? Admittedly, this is an extreme example to illustrate the point. But the facts found by the CFC establish no less clearly that the Government's intentional MRGO-related conduct foreseeably caused the levee to breach and Katrina's floodwaters to catastrophically inundate Petitioners' properties. Pet.32.

c. The Government argues that our causation theory "is unsupported by the CFC's findings of fact," but in its next breath, it robs this claim of any significance by acknowledging that "the court of appeals did not reach" the Government's factual quibbles. Opp.13. It is the Federal Circuit's new blanket causation exemption, not factual disputes, that warrants this Court's review.

In any event, the Government's claim is meritless. The CFC painstakingly reviewed voluminous evidence, including reams of the Government's own analyses, and concluded that "[a]s the record reflects, the flooding of Plaintiffs' properties was the 'direct, natural, or probable result' of the Army Corps' authorized construction, expansions, operation, and failure to maintain the MR-GO…." App.160a. Indeed, the CFC *repeatedly* found that the Government's MRGO-related conduct caused catastrophic flooding of the polder. *See*, *e.g.*, App.148a-52a, 175a-77a, 180a. The CFC also made numerous subsidiary findings to support that conclusion, including findings related to levee breaches. For example, the CFC found that MRGO "spelled the difference" between minor flooding

from overtopping of the levees (without breaches) and "catastrophic flooding through breaches" that resulted only because the Chalmette levees "were exposed to greater stress … for a longer period than would have occurred" absent MRGO. App.151a-52a (quoting Plaintiffs' expert). *See* Pet. C.A. Br. 48-53, 56-59.

Nor is there merit in the Government's random snipes at the CFC's findings. For example, plucking an isolated sentence fragment from the opinion below, the Government charges that we falsely represent that the panel did not question the CFC's "finding" that "'the taking occurred because the MRGO caused breaches in the levees,'" when in fact the panel was referring in this passage only to our "theory" of causation. Opp.14 (quoting App.22a). But it is clear on reading the full passage, App.22a, that the Federal Circuit was referring to the causation "theory" embraced not only by plaintiffs, but also by the CFC.

The Government likewise seizes upon the CFC's reference to evidence regarding "the potential for Reach 1 of the MRGO to funnel storm surge into the downtown New Orleans area," and then notes that the CFC quoted a document concluding that MRGO's Reach 2—where the relevant breaches occurred—"'had little impact on Katrina's storm surge.'" Opp.14. But the CFC's analysis makes clear the principal impact of MRGO's wide fetch along Reach 2 was to *amplify the strength of waves attacking the levee*, regardless of its separate effect on storm surge. *See* App.150a (finding that "breaching was initiated by the excess stress applied to LPV structures … [along Reach 2] by a higher intensity of wave attack than would have occurred if the [MRGO] channel were not

there or farther away" (quoting Plaintiffs' expert)); App.151a-52a.

d. The Government clutters its causation discussion with a number of irrelevant distractions apparently designed to befog the case.

The Government says that "while petitioners contended [below] that the government was required to take the MRGO into account in maintaining the LPV levees, they simultaneously argued that the court of appeals could not consider the LPV's risk-minimizing effect in determining whether a taking had occurred." Opp.9. We argued, it adds, that "the existence of the [LPV] must be ignored" in the causation analysis. Opp.10. We do not recognize this argument attributed to us. Far from "ignoring" the LPV, our causation analysis throughout this case has consistently taken the LPV exactly as it existed when Katrina hit. We have consistently argued (and we proved at trial, as the CFC found) that but for the Government's MRGO-related conduct, the Chalmette levee would not have catastrophically breached and the polder would not have been inundated.

The Government's discussion of its immunity under the Flood Control Act ("FCA"), Opp.10-11, is entirely irrelevant, twice over. First, the FCA does not, and could not, immunize the Government from liability under the Takings Clause. Second, the FCA on its own terms does not immunize the Government from any liability for its actions relating to MRGO, which is a navigation, not a flood control, project. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 444, 448 (5th Cir. 2012), *cert denied*, 570 U.S. 926 (2013).

2.a. With respect to the Federal Circuit's rule that "the government cannot be liable on a takings theory for inaction," App.3a, the Government effectively waves the white flag.

First, as noted earlier, the Government dismisses this inaction rule as an "alternative ruling [that] has no practical consequence…." Opp.15.[2] But the "practical consequence" of the rule was not lost on the Government in another recent takings case, where it urged the Federal Circuit to apply the rule as binding precedent. Brief for the United States at 38, *Rio Linda Elverta Cmty. Sch. Dist. v. United States*, No. 18-1761 (Fed. Cir. July 16, 2018). And the Federal Circuit, citing its decision below, has recently denied a takings claim under "the principle that government inaction cannot be a basis for takings liability…." *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1341 (Fed. Cir. 2018).

Second, the Government offers no answer to our point that its inaction is often the difference between a temporary and a permanent taking. Pet.3, 24. The Government sometimes chooses to terminate a taking, and thus to limit its liability for just compensation, by "elect[ing] to abandon its intrusion or discontinue regulations." *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 317 (1987). *See also United States v. Causby*, 328 U.S. 256, 267-68 (1946). When it elects not to do so, as when it deliberately takes no action to halt "a continuing

[2] The Federal Circuit did not understand its inaction rule to be an "alternative ruling," as it gave this inaction ruling pride of place as the lead holding. App.9a-13a.

process of physical events" that it has set in motion, it is liable for its continuing encroachment on property rights. *United States v. Dickinson*, 331 U.S. 745, 749 (1947). That is this case.

Third, the Government cites no decision of this Court, or any other court, that supports the inaction rule, thus confirming our point that there is no such case (including *Sponenbarger*, the only decision of this Court cited by the panel). Pet.2, 25-26. Even more remarkably, the Government does not even mention *Arkansas Game*, let alone attempt to square its rejection of blanket exclusionary rules with the blanket inaction rule adopted below. And the Government's effort to distinguish the cases discussed in the petition that flatly contradict the inaction rule, Opp.16-18, does not address the portions of those decisions discussing takings liability for deliberate inaction that foreseeably results in interference with property rights.

Fourth, the Government offers no response to our point that there is no principled basis on which to distinguish the Government's 40-year *policy* to allow erosion of MRGO's banks to gradually widen the channel from 650 feet to an average of almost 2,000 feet from a deliberate government decision to widen the channel using construction equipment. Pet.23. The Government's deliberate decisions intentionally produce the same result in both cases, and to conclude that a takings claim can be predicated on one but not the other is unprincipled.

b. The Government charges that our arguments are inconsistent with our argument below that neither our claim nor the CFC's decision was based on the

Government's "'failure to take action such as closing MRGO or armoring MRGO's banks.'" Opp.16 (quoting Pet. C.A. Br. 37). But the Government then answers its own charge, acknowledging that our takings claim below and the CFC's decision did not focus solely on the Government's deliberate policy not to armor the channel's banks, but rather "'were premised on the *entirety* of the MRGO project (design, construction, operation, and maintenance).'" *Id.* (quoting Pet. C.A. Br. 37) (emphasis added). In other words, our "but for" causation analysis below took MRGO as it existed at the time of Katrina: a navigation channel that the Government constructed in the 1960s (amid warnings about its storm-amplifying effects) and over the ensuing decades intentionally allowed to widen through erosion and continued maintenance dredging to well over half a mile in places, notwithstanding prescient warnings from within the Corps itself (never mind the urgent warnings of numerous external experts) that the ever-widening channel posed an ever-increasing risk of "catastrophic damage" from "direct hurricane attacks from Lake Borgne." Pet.32. Our argument was, and continues to be, that the Takings Clause is not blind to some of these facts on the notion that they can be characterized as "inaction."

3. The Government argues that Petitioners' takings claim fails for an independent ground, *i.e.*, that the risk posed by MRGO supposedly was not foreseeable until 2004. Opp.18-19. The short answer is that this foreseeability issue was not reached by the panel, as the Government admits. Opp.18. In any event, the Government's argument wholly lacks merit. The Government ignores the CFC's extensive foreseeability analysis and findings, *see*, *e.g.*, App.54a-

55a, 66a-68a, 71a-73a, 105a-113a, and cherry picks language from a coda to a CFC opinion noting that "by 2004 the 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 [MRGO]," App.176a. The Government also ignores another passage finding that "by 2004-2005 *at the latest* … the risk of injury by flooding was *imminent*." App.159a (emphases added). Both passages simply confirm that by 2004 MRGO was a "ticking time bomb" posing an "imminent" threat, but they do not speak to foreseeability, much less the CFC's findings of foreseeability long prior to 2004.[3]

[3] The Government makes the remarkable assertion that MRGO was closed only for navigability and economic reasons. Opp.19 n.7. This is false. The CFC found that Congress and the Corps resolved to close MRGO because of the project's continuing flood risk. App.177a, 228a. The report the Government cites confirms that environmental and flood-risk concerns primarily motivated the closure. C.A. App. 75,855-56, 75,860, 75,865-66, 75,869.

CONCLUSION

The petition should be granted.

December 3, 2018

Respectfully submitted,

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