Case Nos. 16-2301, 16-2373

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ST. BERNARD PARISH GOVERNMENT,
GWENDOLYN ADAMS, HENRY ADAMS,
CYNTHIA BORDELON, STEVEN BORDELON,
STEVE'S MOBILE HOME AND 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,
Plaintiffs – Cross-Appellants

v.

UNITED STATES,
Defendant – Appellant.

Appeals from the United States Court of Federal Claims,
Case No. 1:05-cv-01119-SGB, Judge Susan G. Braden

REPLY AND RESPONSE BRIEF FOR THE UNITED STATES

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INTRODUCTION

Hurricanes and other natural disasters have repeatedly caused devastating property damage during our Nation's 230-year history. But never before has the damage caused by such a disaster been deemed a taking of property by the government mandating payment from the public fisc. That unbroken history is hardly surprising. When hurricane-driven floodwaters inundate a region, "the direct, natural, or probable" cause of the damage, *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003), is the hurricane—not any action by the government. And it is particularly inappropriate to deem hurricane-induced flooding to be a Fifth Amendment taking where, as here, the plaintiffs' claim amounts to an assertion that a federal system of levees was inadequate to restrain the hurricane's floodwaters.

Our opening brief demonstrated that the CFC's unprecedented holding that Hurricane Katrina's floodwaters effected a Fifth Amendment taking cannot stand because it rests on multiple fundamental errors. Plaintiffs offer no persuasive response. To the contrary, their attempt to defend the CFC's startling result—which departs from the CFC's own reasoning and rests on a critical factual finding that the CFC itself never made—further confirms that the judgment below cannot stand.

ARGUMENT

PART ONE – LIABILITY

I. Plaintiffs' theory that MRGO was the but-for cause of the breach of the Reach 2 LPV levees is legally and factually insufficient.

Plaintiffs attribute the flood damage they experienced from Hurricane Katrina to the combined effects of two federal projects: (1) the Lake Pontchartrain and Vicinity (LPV) Hurricane Protection Project and (2) the MRGO shipping channel. *See* Pl. Br. 11, 49-52. Plaintiffs claim that LPV levees along the stretch of MRGO known as "Reach 2" would not have breached during Hurricane Katrina if the MRGO had not been built, or, at minimum, would have breached later. *See* Pl. Br. 11 (arguing that "without MRGO, the Reach 2 levees would not have breached" during Hurricane Katrina); *see also* Pl. Br. 48-53. That theory is both legally and factually insufficient to establish a Fifth Amendment taking.

A. The federal government did not cause the flood damage to plaintiffs' properties because those properties would have experienced the same or greater flood damage during Hurricane Katrina if neither MRGO nor the LPV-levee system had been built.

Plaintiffs do not dispute that their properties would have experienced the same or even greater flood damage during Hurricane Katrina if the LPV levees and MRGO had never been built. *See* Pl. Br. 53-56. In other words, the combined effect of MRGO and the LPV left plaintiffs no worse off (and likely

better off) than they would have been if the federal government had taken no action at all. *See* Opening Br. 49; *see also* Appx15812-15813, Appx16213-16217. Accordingly, even accepting plaintiffs' theory of MRGO's effect on storm surge during Hurricane Katrina, the federal government's combined actions did not cause plaintiffs any injury and took nothing from them.

The CFC did not address this crucial failure in plaintiffs' proof of causation, other than to deem the government's argument "offensive to the property owners." Appx20345. That is not a legal ruling, and plaintiffs do not attempt to defend it. Plaintiffs instead assert that the LPV levee system was an "unrelated project" that the CFC correctly refused to consider. Pl. Br. 53. But that assertion does not and could not justify the CFC's holding. Plaintiffs themselves have made the breaching of the LPV's Reach 2 levees the centerpiece of their theory of causation. They argue that "[t]he *breaching* of these levees is important" because "water coming through breaches of the Reach 2 levee was by far the greatest source of water that entered the [St. Bernard] polder." Pl. Br. 51 (plaintiffs' emphasis; internal quotation marks, citations omitted). And they argue that "[t]he *timing* of the Reach 2 breaches is important" because their properties would not have been flooded if "the

Reach 2 levees remained intact somewhat longer." Pl. Br. 51-52 (plaintiffs' emphasis).[1]

Having made the breaching of the LPV levees the centerpiece of their takings claim, plaintiffs cannot now insist that the LPV levees should be ignored. 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.

Contrary to plaintiffs' assertion (Pl. Br. 38), their takings claim is the functional equivalent of a challenge to the adequacy of the LPV levees. Their contention that the LPV's Reach 2 levees would not have breached but for MRGO is just another way of saying that the government should have made the Reach 2 levees higher or stronger. The equivalence of those claims is demonstrated by the testimony of plaintiffs' own experts. First, Dr. Kemp stated that he found "no evidence that the MRGO project was ever modified to reduce the predictable excess surge stresses and wave attack caused by the encroachment of the channels on LPV structures, *or, alternatively, that the LPV structures were bolstered in any way to withstand the obviously increasing threat*."

[1] Plaintiffs incorrectly state that these factual assertions are undisputed. We explain below that plaintiffs' assertions are not supported by the CFC's findings or the evidence it discussed. But for present purposes, we assume that their factual assertions are accurate.

Appx18363 (quoting Dr. Kemp) (emphasis added). In other words, Dr. Kemp acknowledged that the risks he attributed to MRGO could have been addressed by modifying *either* MRGO *or* the LPV levees. Second, plaintiffs' coastal oceanography expert, Joseph Suhayda, reinforced that point by testifying about weaknesses in both the design and construction of the LPV levees. Appx11655-11656, Appx10051-10052. The Fifth Circuit underscored the same point in addressing claims arising out of the failure of LPV levees to prevent Hurricane Katrina's flooding. The court explained that the LPV levees are man-made structures. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 218 (5th Cir. 2007). Thus, in the circumstances of Hurricane Katrina and the LPV system, "if a levee fails despite not being overtopped by the floodwaters, it is because the levee was not adequately designed, constructed, or maintained." *Id.* "If a levee fails due to the floodwaters overtopping it or loosening its footings, it is because the levee was not built high enough or the footings were not established strongly or deeply enough." *Id*. Accordingly, all of the claims in the Hurricane Katrina tort litigation could have been described as challenges to the adequacy of the design, construction, or maintenance of the LPV levees. Indeed, some of those claims took that form explicitly. *See*, *e.g.*, *In re Katrina Consol. Canal Breaches Litig. (Robinson)*, 696 F.3d 436, 448 (5th Cir. 2012) ("The *Anderson* plaintiffs allege that they were harmed by the breaching of the levees

along the 17th Street, London Avenue, and Orleans Avenue Canals caused by the negligent dredging of the 17th Street Canal *and the levees' negligent design and construction*.") (emphasis added).

Plaintiffs miss the point when they declare that the LPV levees provided no offsetting benefits during Hurricane Katrina because "the levees breached during Katrina and thus provided no protection." Pl. Br. 55. The crucial point for takings purposes is that the combined effects of the LPV and MRGO did not make plaintiffs any worse off during Hurricane Katrina than they would have been in the absence of federal government action. Had neither the LPV nor MRGO been built, plaintiffs' properties indisputably would have been inundated by Hurricane Katrina's floodwaters to the same or a greater extent. *See* Opening Br. 49; *see also* Appx15812-15813, Appx16213-16217. Thus, by plaintiffs' own concession, their flood damage was not caused by the federal government's actions.

Plaintiffs are equally wrong to assert (at 53-54) that Congress would have authorized the construction of the LPV flood-control project even if it had anticipated that federal liability for hurricane flooding could be premised on the (alleged) interaction between MRGO and the LPV. As our opening brief explained (at 41-44), the Flood Control Act of 1928 provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from

or by floods or flood waters at any place." 45 Stat. at 536 (codified at 33 U.S.C. 702c). That provision, which was critical to the Act's passage, was designed "to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control." *United States v. James*, 478 U.S. 597, 608 (1986).

As plaintiffs acknowledge, "the Fifth Amendment prohibits the '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,'" Pl. Br. 4-5 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). It would be neither fair nor just to require federal taxpayers to pay compensation under the Fifth Amendment for flood damage that occurs when a federal levee system fails to prevent hurricane flooding.

Nothing in the cases on which plaintiffs rely (at 54-56) suggests that the federal government can be held liable for a taking when a federal flood-control project fails to contain hurricane flooding. Plaintiffs' argument mischaracterizes the government's point. The government has not claimed that it can "seek an offset because Plaintiffs' property values may have been enhanced by other unrelated Government services (such as police rather than levee protection)." Pl. Br. 54. The important point is *not* that the LPV levee system provided offsetting protections to plaintiffs' properties during *other*

hurricanes (though it surely did). The crucial point is that, *during Hurricane Katrina itself*, the combined effects of the LPV and MRGO did not cause plaintiffs any injury and took nothing from them. That undisputed fact dooms their takings claim.

B. The CFC did not find that MRGO was a "but for" cause of the breaching of the Reach 2 levees, nor do the CFC's subsidiary findings "lead ineluctably to that conclusion."

For the reasons discussed above, plaintiffs' takings theory would be legally insufficient even if the CFC had found that MRGO was a "but for" cause of the breaching of the Reach 2 levees. But in reality, the CFC never made that critical factual finding.

Although it is the linchpin of their defense of the CFC's decision, plaintiffs do not claim to have located any statement in the CFC opinion that actually says the Reach 2 levees would not have breached during Hurricane Katrina but for MRGO—much less a factual finding to that effect. Instead, plaintiffs assert that "the CFC made a host of other findings that lead ineluctably to that conclusion." Pl. Br. 49. But the statements on which they rely had nothing to do with the Reach 2 levees or the reason those levees failed during Hurricane Katrina. Most notably, plaintiffs rely on reports quoted in the section of the CFC opinion entitled "Because Of The Funnel Effect." *See* Appx18358-18362. Based on those reports, plaintiffs claim that MRGO was a

"superhighway for storm surges" that created a "funnel effect" and increased the "amount of water conveyed into populated areas." Pl. Br. 50 (quoting Appx18358, Appx18359).

The CFC's own opinion shows that that the quoted language was addressing an issue that has no bearing on plaintiffs' claims—the potential for *Reach 1* of MRGO to funnel storm surge into the downtown *New Orleans area*. For example, the 2006 Senate Report quoted by the CFC stated "the six-mile combined section of the [Gulf Intracoastal Waterway, or GIWW]/MRGO (*called 'Reach 1'*) carried the storm surge from Lake Borgne into New Orleans." Appx18361 (quoting S. Rep. No. 109-322, at 124 (2006)) (emphasis added). Similarly, the report stated that, "[p]rior to Hurricane Katrina, many warned that the potential funnel would accelerate and intensify storm surges emerging from Lake Borgne and the Gulf into the *downtown New Orleans area*." Appx18360 (quoting S. Rep. No. 109-322, at 124 (2006)) (emphasis added).

Plaintiffs' properties are not located in the downtown New Orleans area; they own properties in the St. Bernard polder, which comprises St. Bernard Parish and the Lower Ninth Ward. *See* Appx20365; *see also* Opening Br. 7, 12 (maps).[2] And, as their brief makes clear, their theory of causation has nothing

[2] "A polder is a tract of low land reclaimed from a body of water." *Robinson*, 696 F.3d at 443 n.3; *see also* Appx18308 n.5.

to do with the stretch of MRGO known as Reach 1. Rather, plaintiffs claim that St. Bernard polder flooded because LPV levees breached along the *Reach 2* stretch of MRGO. Pl. Br. 11. But the very portion of the 2006 Senate Report that the CFC quoted in its opinion concluded that "the Reach 2 portion of MRGO had little impact on Katrina's storm surge." Appx18361 (quoting S. Rep. No. 109-322, at 124); *see also id*. ("the portion of MRGO running from the GIWW to the Gulf (called 'Reach 2') did not significantly impact the height of Katrina's storm surge"). Thus, the CFC's own opinion contradicts plaintiffs' theory of causation. *See also* Appx11394 (testimony by Dr. Kemp that absent any federal action, a funnel would still exist).

Plaintiffs cannot salvage their theory of causation by quoting the testimony of their expert, Dr. Kemp. Dr. Kemp is a hydrologist, not a civil engineer.[3] He is thus unqualified to testify as to why LPV levees breached. In arguing to the contrary, plaintiffs emphasize that Dr. Kemp served as "lead testifying expert in *Robinson* and coordinated much of the modeling analysis." Pl. Br. 63. But as the district court in *Robinson* explained, the plaintiffs in that case relied on a different expert—Dr. Robert Bea—to provide testimony

[3] *See* Appx10124 (testifying about his areas of expertise); *see also In re Katrina Canal Breaches Consol. Litig. (Robinson)*, 647 F. Supp. 2d 644, 679 (E.D. La. 2009) (noting that "Dr. Paul G. Kemp . . . has a Ph.D. in Coastal Studies/ Marine Science").

regarding the LPV levees, including an opinion about why those levees failed during Hurricane Katrina. *See*, *e.g.*, *Robinson*, 647 F. Supp. 2d at 671-75.

Nor did Dr. Kemp purport to testify as to why LPV levees breached, a topic on which he lacks any expertise. Instead, he made general statements such as: "Except for a limited contribution from rainfall, all flooding of the St. Bernard polder was caused by water that passed through or across one or more reaches of the MRGO." Appx18362 (quoting Dr. Kemp's testimony). That unremarkable testimony says nothing about why LPV levees breached.

Likewise, even if it were true that "all of the LPV structures that breached were adjacent to some part of the MRGO project," Pl. Br. 50 (quoting Appx18363, quoting Dr. Kemp), that would not show that the LPV structures breached because of MRGO. In fact, plaintiffs' quotation of this sentence conspicuously omits the part in which Dr. Kemp acknowledged the breaching of the New Orleans East Back Levee, which is not adjacent to any part of MRGO. *See* Appx18363; Pl. Br. 6 (map). Moreover, as the Fifth Circuit explained, some of the worst flooding occurred as a result of breaching of LPV floodwalls along the London Avenue Canal and 17th Street Canal, which are not adjacent to either stretch of MRGO. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 195 (5th Cir. 2007); *see also* Appx18329 (acknowledging the breaches along the London Avenue Canal and the 17th

Street Canal). That observation was corroborated here by the government's expert evidence at the second trial, which demonstrated that if the MRGO had not been built (but assuming that the levees had breached), all the trial properties still would have flooded. *See* Opening Br. 61; Appx15813.

Nor can plaintiffs fill the void in their proof of causation with Dr. Kemp's references to what the "*Robinson* team" allegedly showed in the tort litigation. Appx18363. That attempt fails for two separate reasons. First, the relevant part of the district court's decision was reversed by the Fifth Circuit. Although plaintiffs assert that "three Fifth Circuit judges . . . reviewed the evidence concerning the cause of Katrina's devastating flooding in the Polder, and none . . . disagreed about MRGO's causal role," Pl. Br. 3, that is a serious mischaracterization of the Fifth Circuit's decision.

The purpose of the government's appeal in *Robinson* was to establish its immunity under the discretionary function exception of the Federal Tort Claims Act (FTCA) or, alternatively, under the Flood Control Act of 1928. A favorable Fifth Circuit decision on either ground would have established circuit precedent governing the hundreds of lawsuits and hundreds of thousands of administrative claims that had been filed under the FTCA in the wake of Hurricane Katrina. By contrast, the district court's fact-findings in *Robinson* had no practical significance beyond the handful of plaintiffs in that

case: *Robinson* was not a class action, and the government is not subject to non-mutual offensive collateral estoppel. *Sun Towers, Inc. v. Heckler*, 725 F.2d 315, 322 (5th Cir. 1984) (citing *United States v. Mendoza*, 464 U.S. 154 (1984)). Accordingly, the government focused its appeal on the legal issues that had wide-ranging significance, not the district court's factual findings. The Fifth Circuit accepted the government's argument that the claims of the St. Bernard polder plaintiffs were barred by the discretionary function exception of the FTCA, and it thus reversed the judgment in favor of the plaintiffs from the St. Bernard polder. *See Robinson*, 696 F.3d at 454 ("we REVERSE the judgments for Kent Lattimore, Lattimore and Associates, and Tanya Smith and the partial judgment for the Franzes"); *see also id*. at 441 ("We REVERSE each judgment for the plaintiffs" and "AFFIRM each judgment for the government."). Plaintiffs cannot rely on findings in a decision that was reversed and that, in any event, would not have bound the government in other lawsuits.[4]

Second, the theory of causation that plaintiffs put forward here contradicts the theory of causation that the plaintiffs offered in *Robinson*. In

[4] The Fifth Circuit in *Robinson* rejected the government's argument that the tort claims were also barred by the immunity provision of the Flood Control Act of 1928, but that ruling had no practical effect because the court held that the FTCA's discretionary function exception "completely insulates the government from liability." 696 F.3d at 454.

Robinson, the district court ruled at an early stage of the litigation that any challenge to the original construction or design of MRGO was barred by the discretionary function exception. *See* 647 F. Supp. 2d at 702 ("prior to trial the Court found that as concerned the initial design and construction of the MRGO, these actions were shielded by the discretionary function exception"). Tailoring their causation theory to that legal ruling, the plaintiffs in *Robinson* argued that the breaching of the Reach 2 levees during Hurricane Katrina was *not* due to the MRGO's original design or construction. Indeed, the *Robinson* plaintiffs took pains to argue that, "[h]ad the Katrina event occurred with the MRGO as designed, the cataclysmic flooding which occurred in the St. Bernard Polder would *not* have happened." *Id.* at 681 (emphasis added).

Instead, the *Robinson* plaintiffs attributed the breaching of the Reach 2 levee to the Corps' failure to armor the banks of MRGO against erosion in the late 1960s or early 1970s, after Congress authorized the construction of the LPV in 1965. The *Robinson plaintiffs'* expert, Dr. Bea, testified that the failure to armor the banks of MRGO was a factor that contributed to the lowering of the Reach 2 levees, a process known as subsidence. *See* 647 F. Supp. 2d at 671-75. The district court found "credible" Dr. Bea's testimony "that 25% of the shrinkage of the levee crest or height or 'protective elevation' was caused by lateral displacement that could have been prevented with foreshore

protection, among other things." *Id.* at 674.[5] Although Dr. Bea thus acknowledged that 75% of the Reach 2 levees' shrinkage was due to other factors, he "assumed" that the Reach 2 levees would have been at their 17.5-foot design height when Hurricane Katrina struck in 2005. *Id.* at 685. And he opined that, had the Reach 2 levees been at their 17.5-foot designed height, given Hurricane Katrina's "18-foot surge, there would be a half-foot overflow for a very short period of time leading to a few wet carpets." *Id.* The district court credited Dr. Bea's "assumption about levee heights" and declared that "[p]roper armoring of the banks before 1975 would have been an effective method to stop the lowering of the protective elevation" of the Reach 2 levee. *Id.* at 675.[6]

Even if the plaintiffs here had presented similar evidence at trial in this case about the cause of the Reach 2 levee breaches (which they did not), the

[5] The term "foreshore protection" was used interchangeably with "armoring" in the *Robinson* opinion.

[6] Although the government treated Dr. Bea's assumptions as true for purposes of its *Robinson* appeal, the flaws in Dr. Bea's assumptions are evident on the face of his testimony. Having conceded that 75% of the lowering of the Reach 2 levees was due to factors unrelated to MRGO, Dr. Bea could not properly assume that the Reach 2 levees would have been at their 17.5-foot design height when Hurricane Katrina struck if the banks of MRGO had been armored decades earlier. Plaintiffs here do not rely on Dr. Bea's testimony, which the CFC did not discuss.

legal theory on which they base their takings claim cannot rationally be supported by the causation evidence that Dr. Bea provided in *Robinson*. As our opening brief explained, a taking cannot result from the government's discretionary inaction. Opening Br. 35 (citing *Ga. Power Co. v. United States*, 633 F.2d 554, 557 (Ct. Cl. 1980), and other cases); *see also* Pl. Br. 36-37 & n.8 (acknowledging this legal principle). The Fifth Circuit explicitly held that the Corps' delay in armoring the banks of MRGO was discretionary. *See Robinson*, 696 F.3d at 451. Plaintiffs here thus premise their takings claim on "the *entirety* of the MRGO project (design, construction, operation, and maintenance)." Pl. Br. 37 (emphasis added). And they take pains to argue that "the CFC did *not* base its analysis on the Corps' supposed failure to take action such as closing MRGO *or armoring MRGO's banks*." Pl. Br. 37 (emphasis added).

In other words, the plaintiffs here disavow the theory of causation on which the *Robinson* plaintiffs relied, and they put forward an alternative theory of causation that contradicts the position the plaintiffs took in *Robinson*. Accordingly, even if the Fifth Circuit had not reversed the relevant part of the *Robinson* decision, plaintiffs could not cure their failure to prove their causation theory by reference to what the *Robinson* team allegedly showed (or what the district court found before its factual findings were rendered a legal nullity).

C. The CFC did not find that the Reach 2 levees would have breached later in the day but for MRGO, nor did the court find that timing of those breaches had any material effect on the amount of flooding in the St. Bernard polder.

Unable to muster support for their claim the Reach 2 levees would not have breached at all during Hurricane Katrina but for MRGO, plaintiffs retreat to the contention that the Reach 2 levees would not have breached until later in the day but for MRGO. Pl. Br. 50-51. And they assert that "had the Reach 2 levees remained intact somewhat longer," their "properties would not have flooded." Pl. Br. 51-52. But plaintiffs presented no evidence to support this two-part theory. And in any event, neither component of their theory is substantiated by the CFC's opinion.

First, the CFC did not find that the Reach 2 levees would have breached later in the day but for MRGO. Although plaintiffs assert that "the Government does not dispute that sufficient evidence supports the CFC's finding that MRGO caused the Reach 2 levees to breach earlier than they would have but for MRGO," Pl. Br. 50-51, there is no such finding in the CFC's opinion. And for reasons already discussed, the snippets of Dr. Kemp's testimony that plaintiffs quote (Pl. Br. 52-53) could not support such a finding even if one existed. To repeat, Dr. Kemp is not a civil engineer and he was unqualified to opine on when LPV levees might have breached under hypothetical scenarios. And in any event, his vague statement that "the onset

of breaching and flooding was advanced by the presence of the MRGO" (Appx18362, quoting Dr. Kemp) does not purport to opine on when the Reach 2 levees would have breached if MRGO did not exist.

Second, the CFC did not find that plaintiffs' "properties would not have flooded" if "the Reach 2 levees had remained intact somewhat longer." Pl. Br. 51-52. In the pages of the opinion that plaintiffs cite (Pl. Br. 51, citing Appx18328-18329), the CFC simply recounted the sequence of various LPV levee and floodwall breaches without suggesting that the timing of this sequence had significance. And while plaintiffs resort to the familiar block quote from Dr. Kemp, *see* Pl. Br. 51 (citing Appx18362-18363), he did not claim that the flooding of plaintiffs' properties would not have occurred if the Reach 2 levees had breached later in the day. In short, not only did plaintiffs present no evidence to support this argument, but nothing in the CFC opinion suggests that the amount of flooding that resulted from the breaching of the Reach 2 levees depended on the time of day that those levees breached.[7]

[7] Plaintiffs note that there was a dispute in *Robinson* over whether the Reach 2 levees breached because of frontwide wave attacks or backside erosion due to overtopping. Pl. Br. 52 n.12. That dispute had nothing to do with the argument that plaintiffs are making here. The *Robinson* plaintiffs did not claim that the time of the breaches had a material effect on the flooding. Instead, the scenario under which the *Robinson* plaintiffs' expert, Dr. Bea, posited that there would have been only "a half-foot overflow for a very short period of time leading to a few wet carpets," 647 F. Supp. 2d at 685, was a counterfactual scenario in which the Reach 2 levees were at their full 17.5 foot design height

The CFC's opinion also contradicts plaintiffs' assertion that the "separate breaches along the IHNC Floodwall did not impact the flooding of the St. Bernard basin." Pl. Br. 51 (quotation marks omitted). The CFC recognized that "flood water began entering the Lower Ninth Ward through breaches in the IHNC floodwall," Appx18328, and that, "[b]y mid-morning, floodwaters from the IHNC breaches to the west merged with the floodwaters from the Chalmette area to the east," Appx18329. And the CFC noted that Dr. Kemp himself acknowledged that breaches in the IHNC floodwalls caused flooding in the Lower Ninth Ward. *See id*. ("[a]s for the Lower Ninth Ward, 'water originating in Lake Borgne traveled up the MRGO, into the IHNC, and through the breached IHNC flood walls'") (quoting Dr. Kemp); *see also* Appx18362 (noting that floodwaters "entered the developed area as a result of catastrophic floodwall failures along the IHNC") (quoting Dr. Kemp). Indeed, in the *Robinson* decision on which plaintiffs seek to rely, the district court found that "the destruction of the home" of the plaintiffs from the Lower Ninth Ward "was caused by the six feet of water that rushed through the breaches of

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when Hurricane Katrina struck, *see id*. In reality, "most of the levee along the MRGO was below the 17.5 design height at the time of Hurricane Katrina." *Id*. at 673. In any event, the district court's findings in *Robinson* did not survive the Fifth Circuit's order reversing the judgment. *See* Opening Br. 56-57.

the IHNC floodwall causing the destruction of the foundation of the Franz home." 647 F. Supp. 2d at 735.[8]

D. Plaintiffs largely abandon their claim that properties outside the LPV levee system would not have been flooded during Hurricane Katrina but for MRGO, and the CFC's finding of liability with respect to those claims is unsupported.

As our opening brief demonstrated (at 53-54), the CFC's liability decision is flawed for the additional reason that it failed to differentiate among properties within and outside the federal levee system. Plaintiffs relegate to a footnote their claim that properties *outside* the LPV levees would not have flooded during Hurricane Katrina absent MRGO. *See* Pl. Br. 59 n.17. And they do not dispute that the properties outside the levee system always flooded during hurricanes even before MRGO was completed. *See* Opening Br. 39; *see also*, *e.g.*, Appx10389 (noting that the properties outside the federal-levee system "were flooded during each of the five hurricanes that have struck the area since Betsy on September 10, 1965") (citing Dr. Kemp's testimony). Indeed, Dr. Kemp conceded that "every hurricane has some effect on flooding

[8] Plaintiffs do not contend that the flooding that resulted from breaches of the IHNC floodwalls was attributable to MRGO. Even if they did, the *Robinson* court rejected a similar claim made by the plaintiffs in that case as "directly contradicted by the unequivocal testimony of plaintiffs' own expert, Dr. Robert Bea," who testified that "the east walls of the IHNC would have failed regardless of the MRGO." 647 F. Supp. 2d at 735.

outside the levee system." Appx11446; *see also* Appx10857-10858 (exhibit to Dr. Kemp's testimony) (acknowledging that most of plaintiffs' property, including all that is outside the federal-levee system, flooded during Hurricane Betsy); *Graci v. United States*, 435 F. Supp. 189, 195 (E.D. La. 1977) (finding after a trial that "MRGO did not in any manner, degree, or way induce, cause, or occasion flooding in the Chalmette area" during Hurricane Betsy).

This evidence wholly undermines plaintiffs' assertion that the properties outside the LPV levee system would not have flooded during Hurricane Katrina absent MRGO. The quotations from Dr. Kemp's testimony on which plaintiffs rely (Pl. Br. 59 n.17, citing Appx18331, Appx18357-18358) did not address this uncontested evidence, nor did Dr. Kemp claim that the properties outside the LPV levee system would not have flooded during Hurricane Katrina but for MRGO. Moreover, Dr. Kemp's general statements about the environmental effects of MRGO are not a substitute for a finding by the CFC that MRGO was a "but for" cause of plaintiffs' flood damage. To the extent that the CFC inferred from Dr. Kemp's testimony that the properties outside the LPV levee system would not have flooded during Hurricane Katrina absent MRGO, that inference was unsupported by the testimony quoted by the court, contrary to the undisputed evidence discussed above, and clearly is erroneous.

II. Even if plaintiffs were correct that MRGO was a but-for cause of the flooding of their properties during Hurricane Katrina, that flooding would not constitute a Fifth Amendment taking

Even if plaintiffs were correct that the presence of MRGO was a but-for cause of the flooding of their properties during Hurricane Katrina, it would at most establish a potential tort claim, not a Fifth Amendment taking. Under this Court's precedent, a taking does not occur unless, at a minimum, (1) "the government intends to invade a protected property interest or the asserted invasion is the direct, natural, or probable result of an authorized activity," and (2) the "nature and magnitude" of the invasion are such as to constitute a taking rather than merely inflicting an injury to property for which recovery might be available in tort. *Ridge Line*, 346 F.3d at 1355-56. Neither requirement is satisfied here.

A. Even accepting plaintiffs' view of the facts, the flooding of their properties during Hurricane Katrina was not the direct, natural, or probable result of the government's actions.

1. The CFC erred in transforming the "direct, natural, or probable" standard into a foreseeability inquiry.

It is a bedrock principle of takings law that "[a]ccidental, unintended injuries inflicted by governmental actors are treated as torts, not takings." *In re Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 799 F.2d 317, 326 (7th Cir. 1986) (cited with approval in *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 522 (2012) (*Arkansas*)). This Court has implemented that principle by

holding that a physical taking occurs only if "the government intends to invade a protected property interest or the asserted invasion is the direct, natural, or probable result of an authorized activity." *Ridge Line*, 346 F.3d at 1355-56. That fundamental requirement forecloses plaintiffs' claim, because the flooding of their property was the "direct, natural, or probable" result of a hurricane—not of the government's construction of a navigation channel decades earlier. As our opening brief demonstrated (Br. 23-33), the CFC reached a contrary conclusion only because it improperly transformed *Ridge Line*'s "direct, natural, or probable" causation standard into a mere foreseeability requirement. Plaintiffs offer no sound response.

First, plaintiffs assert (Br. 19-20) that *Ridge Line*'s two-part test for takings liability did not surviving the Supreme Court's decision in *Arkansas*. That is incorrect. The Supreme Court itself cited the relevant passage of *Ridge Line* with approval, *see Arkansas*, 133 S. Ct. at 522 (citing *Ridge Line*, 346 F.3d at 1355-1356), as did this Court on remand, *see Arkansas Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1372 (Fed. Cir. 2013) (same). Moreover, there was no dispute in *Arkansas* as to whether the flooding was the direct, natural, or probable result of government action, because the government itself had released floodwaters from a dam as part of the intended and authorized operation of the project. There was no hurricane or other intervening cause of

the flood damage, and the plaintiff in *Arkansas* did not rely on an attenuated chain of causation akin to the theory that plaintiffs urge here. Plaintiffs thus cannot escape their burden under *Ridge Line*.

Second, plaintiffs assert that the "proper inquiry" under the first prong of the *Ridge Line* test "is whether the invasion is the foreseeable result of the government action." Pl. Br. 21 (capitalization altered). But this Court has held otherwise. Although foreseeability is *necessary*, *see, e.g.*, *John Horstmann Co. v. United States*, 257 U.S. 138, 146 (1921); *Ridge Line*, 346 F.3d at 1356, it is not *sufficient* to satisfy the first prong of the *Ridge Line* test. To the contrary, "[f]oreseeability and causation are separate elements that must both be shown." *Cary v. United States*, 552 F.3d 1373, 1379 (Fed. Cir. 2009); *accord Moden v. United States*, 404 F.3d 1335, 1343 (Fed. Cir. 2005) ("*In addition to causation*, an inverse condemnation plaintiff must prove that the government should have predicted or foreseen the resulting injury.") (emphasis added).

This Court's insistence on a showing beyond foreseeability makes good sense. Even in the tort context, the foreseeability of a risk is not a sufficient basis on which to premise liability. On the contrary, even tort liability is cabined by the doctrine of proximate cause. As the Supreme Court has explained, "[t]he term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX*

Transp., Inc. v. McBride, 564 U.S. 685, 692 (2011) (citation omitted). "[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *Id*. at 692-93 (quoting *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting)).

Although common-law "proximate cause" formulations vary, the tendency is "to look for some single, principal, dominant, 'proximate' cause of every injury," with most definitions using words such as "natural or probable" or "direct" to describe the "required relationship between injury and alleged negligent conduct." *Id*. (citations omitted). And as the Supreme Court recently emphasized, "foreseeability alone does not ensure the close connection that proximate cause requires." *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1306 (2017). To the contrary, in a variety of tort contexts the Supreme Court has concluded that proximate causation requires "some direct relation between the injury asserted and the injurious conduct alleged." *Id*. (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992)). And the Court has instructed that "[t]he general tendency" in proximate causation inquiries "is not to go beyond the first step" of a causal chain. *Id*. (quoting *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 10 (2010)).

Those principles of proximate causation apply with far greater force in the takings context, where *Ridge Line*'s "direct, natural, or probable" standard is intended as the legal equivalent of the government's "inten[t] to invade a protected property interest" for public use and thereby to "distinguish[] physical takings from possible torts." 346 F.3d at 1355. This Court has emphasized that even if a harm caused by the government's actions was "foreseeable to the government," no taking occurs if the causal link is too attenuated or if an "intervening cause * * * broke the chain of causation between the authorized government act and the injury." *Cary*, 552 F.3d at 1380. Thus, the Court of Claims emphasized that a taking cannot arise from "a random [flood] event induced more by an extraordinary natural phenomenon than by Government interference." *Wilfong v. United States*, 480 F.2d 1326, 1329 (Ct. Cl. 1973). Likewise, the Court of Claims repeatedly rejected flooding-related takings claims where the flooding would not have occurred except for extreme acts of nature such as "unprecedented rainfall." *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 709 (Ct. Cl. 1955); *see Bartz v. United States*, 633 F.2d 571, 577 (Ct. Cl. 1980) ("Excessive precipitation was the root cause of the flooding[.] * * * The government's [action] played only a secondary role.").

Those principles are fatal to plaintiffs' claim: Plaintiffs contend that MRGO, a shipping channel constructed in the 1950s and 1960s, caused the flooding of their properties because it led to the failure of the LPV levees during a hurricane almost half a century later. Plaintiffs' theory of causation is attenuated, resting on "the combined effect" of environmental changes such as "increased salinity, habitat/wetland loss, and erosion," which assertedly operated over the span of decades. Pl. Br. 28. And plaintiffs' injury ultimately resulted from an unprecedented natural disaster—"a clear intervening cause." *Cary*, 552 F.3d at 1380.

Third, plaintiffs cite a host of cases in an attempt to minimize the showing required by *Ridge Line*. Pl. Br. 22-27. Tellingly, however, all of those cases involved causal chains far more direct than the one on which plaintiffs rely here. Indeed, in most of the cited cases, the plaintiffs were landowners upstream from federally constructed dams, and the courts held or assumed that the flooding of their properties was the natural and inevitable result of the construction of the dam and thus was an integral feature of the intended and authorized operation of the project.[9] And, most importantly, none of the cases

[9] *See United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 800, 812 (1950) (the government flooded plaintiffs' land by "artificially maintaining the Mississippi River * * * continuously at ordinary high-water level" in order to facilitate navigation); *United States v. Dickinson*, 331 U.S. 745, 750-751 (1947) (the government took land that "inevitably washe[d] away as a result of th[e]

on which plaintiffs relied involved anything like the extraordinary intervening cause of Hurricane Katrina.

2. In any event, the flooding of plaintiffs' properties was not foreseeable when the government acted.

In any event, plaintiffs' claims would fail even if plaintiffs were correct that a mere showing of foreseeability is sufficient to satisfy the first prong of the *Ridge Line* test. As discussed above, the risk that plaintiffs attribute to MRGO is entirely dependent on the (alleged) interaction between the MRGO channel and the LPV flood-control system. Plaintiffs do not claim that MRGO would have had any material effect on Hurricane Katrina's flood damage in a hypothetical "state of nature" in which the LPV did not exist. Absent the LPV, plaintiffs' properties indisputably would have been inundated by Hurricane Katrina's floodwaters to the same or a greater extent. The crux of plaintiffs' claim is that the MRGO posed a risk *to the Reach 2 LPV levees*, which, they assert, would have withstood Hurricane Katrina but for MRGO. And they emphasize that this risk was attributable to "the *entirety* of the MRGO project," dating back to its original "design" and "construction." Pl. Br. 37

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flooding" caused by a dam); *Owen v. United States*, 851 F.2d 1404, 1408 n.4 (Fed. Cir. 1988) ("assum[ing]," without deciding, that "the damage was a direct and natural consequence of the Corps' construction activities"); *Cotton Land Co. v. United States*, 75 F. Supp. 232, 234 (Ct. Cl. 1948) (finding that a dam caused a taking because the flooding of the plaintiff's property was the "natural consequence of the Government's act").

(emphasis added). Even if such a theory were viable as a legal matter, to establish a taking, plaintiffs had to prove, at a minimum, that the breach of the LPV levees was the foreseeable result of MRGO when the channel was designed and built. Plaintiffs failed to carry that burden for three reasons.

First, plaintiffs' claim that the destruction of the LPV levees was a foreseeable result of the original construction of MRGO is incoherent. When Congress authorized MRGO's construction, the LPV flood-control system did not yet exist. It thus would have been impossible for Congress to have foreseen an impact on the LPV levee system.

Congress authorized the construction and design of MRGO in 1956. *See* Pub. L. No. 84-455, 70 Stat. 65 (1956) (providing that the MRGO channel should be built "substantially in accordance with the recommendation of the Chief of Engineers contained in House Document Numbered 245, Eighty-second Congress"). Initial construction of the MRGO channel was completed in 1963. *See* Appx18316. It was not until 1965 that Congress authorized the construction of the LPV. *See* Flood Control Act of 1965, Pub. L. No. 89-298, 79 Stat. 1073, 1077 (1965). Thus, even assuming *arguendo* that the breaching of the Reach 2 levees during Hurricane Katrina could be attributed to the indirect effects of MRGO, that result could not have been foreseen when Congress approved the MRGO channel's construction and design.

It is thus unsurprising that the documents on which plaintiffs rely as support for the CFC's ruling made no reference to the LPV levees. For example, plaintiffs quote a 1957 document from the St. Bernard Tidal Channel Advisory Committee stating that "[d]uring times of hurricane conditions, the existence of [MRGO] will be an enormous danger to the heavily populated areas of the Parish due to the rapidity of the rising waters reaching the protected areas in full force through the avenue of this proposed channel." Pl. Br. 29 (quoting Appx18344). Similarly, they cite a 1958 document indicating that the Corps was aware that the construction of the MRGO channel could damage wetlands and cause other ecological changes. Pl. Br. 29 (quoting Appx18341). Documents of this kind did not warn of a risk to the LPV levees. And that was the risk that plaintiffs were required to show. As plaintiffs have now made clear, their claim is that their properties would not have flooded during Hurricane Katrina if the LPV levees had withstood storm surge. The relevant question for foreseeability purposes thus is not whether MRGO created some risk of increased storm surge. *But see* Pl. Br. 28-29. Instead, the question is whether it was foreseeable that the increased storm surge would overwhelm the LPV levees. And plaintiffs have not even attempted to make that showing.

Second, and in any event, the CFC's conclusion that the increased storm surge during Hurricane Katrina was the foreseeable result of MRGO relied in substantial part on evidence of what was foreseeable to the government long after MRGO was authorized and constructed. Indeed, the CFC's only finding on foreseeability was that the risk from MRGO should have been foreseeable "by 2004." Appx18375; *accord* Appx18367. Even if it were correct, that finding of foreseeability decades after the relevant government action could not support takings liability.

Plaintiffs disavow any reliance on the CFC's pronouncement that the relevant risk was foreseeable by 2004, asserting that our brief "cherry picks" this passage from the CFC's opinion. Pl. Br. 31. The CFC's reasoning, which appears in its "Conclusion," Appx18374, speaks for itself. In any event, neither the CFC nor the plaintiffs identifies *any* government action that created a foreseeable risk to the Reach 2 levees at the time the action was taken. Plaintiffs assert that, under this Court's decision in *Arkansas Game*, the Court should consider what was foreseeable to the government during some undefined period extending at least into the 1980s. Pl. Br. 30-31. In fact, however, *Arkansas Game* says just the opposite. There, this Court found the foreseeability requirement satisfied only after determining that the relevant property damage was foreseeable "in the spring of 1996," *before* the Corps

approved the releases of water that caused the damage. 736 F.3d at 1373-1374. That focus accords with other decisions of this Court and the Supreme Court, which uniformly focus on what was foreseeable to the government at the time of the government action that is claimed to have constituted a taking—here, the construction of MRGO. *See, e.g.*, *Arkansas*, 133 S. Ct. at 522; *John Horstmann Co.*, 257 U.S. at 146; *Moden*, 404 F.3d at 1343.

Plaintiffs thus err in relying on documents from 1984 and 1988—much less 2004 and 2005. *See* Pl. Br. 29. Neither plaintiffs nor the CFC have identified any government action during that time period that could form the basis for a takings claim. Plaintiffs attempt to assign liability to the Corps' "deliberate decision not to armor [MRGO's] unprotected banks." Pl. Br. 30. But that *failure* to act cannot support takings liability, because "a taking may not result from * * * discretionary inaction." *Ga. Power Co. v. United States*, 633 F.2d 554, 557 (Ct. Cl. 1980); *see Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1333 (Fed. Cir. 2006). Indeed, plaintiffs themselves elsewhere correctly disclaim reliance on governmental *inaction*, asserting that "the CFC did not base its analysis on the Corps' supposed failure to take action such as closing MRGO *or armoring MRGO's banks*." Pl. Br. 37 (emphasis added).

Third, even setting aside that fundamental temporal problem, plaintiffs' generalized references to MRGO's asserted effect on "storm surge" (*e.g.*, Pl.

Br. 1, 2, 15, 28, 30, 49, 50, 53, 63) underscore the perils of constructing a theory of liability from a hodgepodge of statements regarding MRGO's alleged environmental effects. The CFC's own opinion recognized the 2006 Senate Report's conclusions, discussed *supra*, that "the Reach 2 portion of MRGO had little impact on Katrina's storm surge" and "did not significantly impact the [storm surge] height." Appx18361 (quoting S. Rep. No. 109-322, at 124).

Moreover, in the part of the *Robinson* decision that the Fifth Circuit affirmed, the district court *rejected* the claims of the plaintiffs from the New Orleans East polder, who alleged that "MRGO created a 'funnel effect' that increased the power of Hurricane Katrina's storm surge such that the Reach 1 levee was breached and the Citrus Back levee was overtopped, exacerbating the flooding of their house." *Robinson*, 696 F.3d at 452-53. The district court found that such a risk was unforeseeable, explaining that the Corps had reasonably relied on a report indicating that "the effect of the Mississippi River Gulf Outlet is almost negligible for all large hurricanes accompanied by slow-rising storm surges." 647 F. Supp. 2d at 696 (quoting the Bretschneider and Collins report). The Fifth Circuit affirmed that finding, explaining that "there were several later studies and occurrences that supported the Bretschneider and Collins report's conclusions, including a 2003 Corps study and the experience of Hurricane Camille." 696 F.3d at 453.

B. Flooding damage resulting from a singular unprecedented hurricane is in the nature of a tort, not a taking.

The second prong of the *Ridge Line* test requires a plaintiff to show that the "nature and magnitude" of the invasion are such as to constitute a taking rather than merely inflicting an injury to property for which recovery might be available in tort. *Ridge Line*, 346 F.3d at 1355-56. Our opening brief demonstrated that the flooding at issue here—which was the result of damage to the LPV levees caused by a singular, unprecedented hurricane—does not satisfy that standard. Br. 38-41. That conclusion follows from the established principle that a taking occurs only where the government's interference with a plaintiff's property rights was "substantial and frequent enough to rise to the level of a taking." *Ridge Line*, 346 F.3d at 1357. Here, plaintiffs suffered flooding that was destructive and severe, and plaintiffs asserted that they were "ousted from their properties for weeks, and in some cases months." Pl. Br. 43. But plaintiffs cite no case finding *Ridge Line*'s second prong satisfied by a singular incident like the one at issue here. And plaintiffs also offer no persuasive basis for distinguishing this Court's decision in *Cary*. There, too, the plaintiffs' "real and personal property was destroyed," and the plaintiffs argued that they satisfied the second prong of the *Ridge Line* test because "their right to enjoy their property has been preempted for an extended period of time" by a fire. *Cary*, 552 F.3d at 1380. But this Court nonetheless held that

the invasion of the plaintiffs' property was not "substantial and frequent enough to rise to the level of a taking" because the singular fire did not alter the character of the land or prevent the plaintiffs from rebuilding. *Id*. The same is true here.

C. Plaintiffs' takings theory has no support in precedent and could expose federal, state and local governments to staggering liability whenever hurricane flooding inundates a developed area.

Although it is unnecessary for this Court to decide whether flood damage caused by a hurricane could ever be deemed a constitutional taking, it should be understood that plaintiffs' novel takings theory has no support in precedent and could, if adopted, expose federal, state and local governments to massive liability whenever hurricane flooding inundates a developed area.

Plaintiffs contend that hurricane flood damage should be treated as a constitutional taking if the government "creates a *man-made* risk that results in catastrophic flooding" and that risk was foreseeable at the time it was created. Pl. Br. 17 (plaintiffs' emphasis). Although plaintiffs' brief cites nearly one hundred cases, they do not claim to have identified a single case to hold any government—federal, state, or local—liable on a takings theory for damage caused by a hurricane or other natural disaster. Damage caused by a hurricane, earthquake, or other natural disaster is not a taking of private

property for public use. And there is no justification whatsoever to shift the burden of such property damage to the taxpayers.

By contrast, plaintiffs' argument, if accepted, could expose state and local governments (as well as the federal government) to crippling takings liability for hurricane flooding.[10] All developed areas have man-made features arising out of public works projects, and many such features could be said to have altered the environment in ways that foreseeably could contribute to hurricane-flood risks during Hurricane Katrina itself or future hurricanes.

For example, many of the New Orleans canals were built by the State of Louisiana or its municipal agencies. The IHNC (also known as the Industrial Canal) was built by the State, *see* Appx18309, and the three drainage canals—the 17th Street Canal, the London Avenue Canal, and the Orleans Avenue Canal—were constructed and maintained by local agencies. *See* Appx38030-38043. During Hurricane Katrina, LPV levees and floodwalls breached along each of these canals, resulting in catastrophic flooding. *See*, *e.g.*, Appx18329. Indeed, some of Hurricane Katrina's most significant flood damage occurred when levees and floodwalls along the 17th Street Canal, the Industrial Canal,

[10] Because the Just Compensation Clause has been incorporated into the Fourteenth Amendment, it applies to state and local governments as well as to the federal government. *See McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 759 (2010) (citing *Chicago B. & Q.R.R. v. Chicago*, 166 U.S. 226 (1897)).

and the London Avenue Canal ruptured, permitting water from the flooded canals to inundate the City of New Orleans. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 195 (5th Cir. 2007). "At one point in Katrina's aftermath, approximately eighty percent of the city was submerged in water." *Id*. at 195-96.

On plaintiffs' logic, the businesses and residents whose properties were destroyed by that flooding could demand compensation from Louisiana and its municipalities. To establish takings liability, it would suffice for them to show that the construction or operation of these canals by state or local governments created a foreseeable risk that hurricane driven floodwaters would breach the adjacent levees. Such allegations would not be difficult to make. For example, although the three drainage canals ordinarily "serve as conduits for the drainage of excess water from the streets of New Orleans during rain events, these same canals become channels for incoming storm surge creating increased risk of flooding caused by Lake Pontchartrain hurricane driven water." *In re Katrina Canal Breaches Consol. Litig. (Anderson)*, 533 F. Supp. 2d 615, 619 (E.D. La. 2008). The Independent Levee Investigation Team that examined the failure of the LPV system during Hurricane Katrina concluded that "[d]ysfunctional interaction" between local authorities prevented the installation of flood gates that could have prevented storm surges from raising

the water levels within the canals, thereby creating "potentially vulnerable 'daggers' pointed at the heart of * * * New Orleans." Appx37929.

Indeed, if plaintiffs' legal theory were adopted, the State and its local governments could be held liable for the very hurricane flooding that plaintiffs attribute to MRGO, because "local cooperation" was an essential prerequisite to Congress's authorization of the MRGO project. *See* Pub. L. No. 84-455, 70 Stat. 65 (1956) (noting "the conditions of local cooperation specified in House Document Numbered 245, Eighty-second Congress"). The contemporaneous Senate Report emphasized that "representatives of the Governor of the State of Louisiana and the Mayor of New Orleans" had testified in favor of the project, and that "[t]here was no opposition to the proposed channel." *Authorizing the Construction of the Mississippi-River Gulf Outlet*, S. Rep. No. 84-1637, at 3 (March 7, 1956). The Senate Report further explained that "the port commissioners have agreed to meet the requirements of local cooperation for this route," *id*. at 7, including requirements of "furnishing lands, easements, rights-of-way, spoil deposit areas, and making relocations and alterations of highways and utilities," as well as the requirement that "local interests" construct and maintain terminal facilities for the expanded port, *id*. at 6. Thus, if plaintiffs' reasoning had any merit (which it does not), the State and its local governments could likewise be held liable for all of the flood damage that the

CFC attributed to MRGO. *See* Appx18302-18303 (attributing to MRGO the flooding caused by Hurricane Katrina, Hurricane Rita, Hurricane Gustav, and Hurricane Ike).

Moreover, the usual limitations on governmental liability that apply in the tort context would not protect governments from the takings claims that plaintiffs' theory would unleash. For example, federal law and Louisiana law generally preclude tort liability based on discretionary governmental actions. *See* 28 U.S.C. § 2680(a) (discretionary function exception of the FTCA); *Gregor v. Argenot Great Cent. Ins. Co.*, 851 So. 2d 959, 963 (La. 2003) (describing a similar provision of Louisiana law). But those protections would be unavailable in the context of a constitutional claim. And even if such claims were unsuccessful, the litigation costs alone could impose significant burdens on federal, state, and local governments. The trial in *Robinson*, for example, cost the federal taxpayers millions of dollars that could not be recovered even though the Fifth Circuit ultimately rejected the claims.[11]

[11] *See* Dkt. Entry 20373 at 2-3, *In re Katrina Consol. Canal Breaches Litig. (MRGO)*, No. 05-4182 (E.D. La. Aug. 12, 2011).

In short, plaintiffs' takings theory is an extraordinary departure from settled precedent that would raise the specter of crippling liability for damage caused by natural disasters. The CFC's liability ruling should be reversed.

PART TWO – VALUATION

Because there is no basis for liability, the Court need not address the multitude of flaws in the CFC's compensation decision. Nonetheless, we briefly respond to the plaintiffs' compensation arguments below, including the arguments they present in their cross appeal (points II and VI, *infra*).

I. No compensation is owed because the federal government did not cause plaintiffs any injury.

Plaintiffs' defense of the amount of the CFC's award rests on the premise that the federal government caused all of their flood damage. *See* Pl. Br. 66. That premise is incorrect for the reasons discussed at pp. 2-21, *supra*. Plaintiffs bore the burden of proving causation and, as shown above, they failed to demonstrate that the federal government's actions caused them any injury whatsoever, much less *all* of the damage that followed the passage of Hurricane Katrina. Accordingly, plaintiffs are not entitled to any compensation from the federal government, even if the valuation testimony of the federal government witnesses Dr. Westerink and Mr. Fitzgerald is not considered.

In any event, the CFC abused its discretion by disregarding that testimony. The plaintiffs' principal argument (Pl. Br. 66-67), that the government presented the experts' testimony for the improper purpose of relitigating causation, is incorrect for several reasons. First, the CFC did not make any finding on the cause of the levee breaches before conducting the valuation trial, or even in the liability opinion that it issued more than 17 months later. That the CFC told the parties at an earlier date that it was going to hold the government liable for a taking says nothing about the scope of the property interest taken, among other details necessary for determining valuation. For although the plaintiffs at the liability trial had generally asserted that the government was responsible for all of the flooding on their properties during the Hurricane, they did not present any specific evidence as to the depth to which their properties would have flooded absent MRGO, the LPV, or both. That the government presented valuation-stage evidence on such topics, all necessary factors for properly calculating compensation, does not mean that the government was relitigating causation.

Additionally, the government did not seek to relitigate causation because its valuation-stage experts did not offer any opinion on the cause of the levee breaches (Appx17035, Appx17163)—the essential issue in determining causation, about which the plaintiffs presented no evidence, either. Instead,

the government's experts testified that, assuming the levees would have breached if MRGO had not been built (for, again, the CFC made no finding that the MRGO was a but-for cause of the levee breaches), the trial properties would still have flooded to virtually the same or a greater extent. Appx15743, Appx15813. That evidence was properly offered to demonstrate that the value of any property interest taken was zero.

Moreover, contrary to plaintiffs' assertion (Pl. Br. 68), the Westerink-Fitzgerald modeling in this case is consistent with the government's proposed findings of fact in *Robinson*. For example, the government's proposed findings of fact in *Robinson* stated: "If the MRGO had not been present and the wetlands had been in their 1956 configuration, the surge elevation east of the Chalmette levee would have been almost the same as during Hurricane Katrina, with no change in most of the area and less than 3 inches of change in a small part of it." Appx17958 (citing Westerink 3872:10-20, 4152:5-12). Likewise, the government's proposed findings stated that "[t]he post-construction enlargement of the MRGO had 'very minimal effects,'" *id.* (quoting Westerink 3698:25 - 3699:5), and that "[t]he degradation of the wetlands since the construction of the MRGO had minimal effect on maximum surge elevations," Appx17959 (citing Westerink Expert Report at 78). In other words, the government's proposed findings of fact in *Robinson*

stated that Hurricane Katrina's flooding could not be attributed either to MRGO's original construction or to the subsequent widening of the channel. Fitzgerald and Westerink testified consistently here, and nothing in the proposed findings from *Robinson* supports plaintiffs' demand to be compensated by federal taxpayers for Hurricane Katrina's flood damage.

In addition, the CFC's compensation analysis is erroneous because the court failed to account for the flood damage caused by the separate breaches along the IHNC. No evidence submitted below (or in *Robinson*) supports the theory that the MRGO caused the IHNC floodwalls to breach, and the government's evidence in this case showed several of plaintiffs' properties would have flooded to significant depths even if only the IHNC floodwalls had breached during Hurricane Katrina. *See* Appx15805, Appx15813 (comparing A1 with A2, B2).

Although plaintiffs seek to rely on the government's proposed finding in *Robinson* that the "IHNC breaches did not impact the flooding of the St. Bernard basin," Pl. Br. 68 (quoting Appx17965), the district court in *Robinson* found that "the destruction of the home" of the plaintiffs from the Lower Ninth Ward "was caused by the six feet of water that rushed through the breaches of the IHNC floodwall causing the destruction of the foundation of the Franz home." 647 F. Supp. 2d at 735. And the district court rejected

the *Robinson* plaintiffs' claim that "the MRGO was a substantial factor in the breaching of the IHNC floodwalls," explaining that the claim was "directly contradicted by the unequivocal testimony of plaintiffs' own expert, Dr. Robert Bea," who testified that "the east walls of the IHNC would have failed regardless of the MRGO." *Id.*[12]

II. Plaintiffs' quarrel over the "end date" of the alleged taking confirms that this suit is a challenge to the adequacy of the LPV flood-control system.

At trial, the government argued that if the CFC found that a taking had occurred, it ended when the floodwaters receded and plaintiffs were allowed to return to their properties—no later than September 2005 for residents of St. Bernard Parish and May 2006 for the Lower Ninth Ward. Appx17720. The CFC, however, disagreed and ruled that the alleged taking ended on June 30, 2009, when the Corps closed the MRGO to deep-draft navigation. Appx18371. The Corps closed the channel to shipping traffic after Hurricane Katrina at the direction of Congress because shoaling from the hurricane made MRGO unnavigable for deep-draft shipping and because restoring the channel to pre-Katrina navigational use was not economically justified. *See* Appx75864, Appx75867. But it is unclear why the CFC selected that date as

[12] The Fifth Circuit affirmed that judgment in the government's favor on other grounds. *See id.* at 454.

the end-date of the asserted taking of plaintiffs' property—and because the CFC's basis for finding a taking was itself unclear, it is also unclear what the appropriate end date should have been.

Plaintiffs do not specify an end date, but they assert that the alleged taking did not end until "at the earliest" June 1, 2011, "when the Corps substantially completed the new HSDRRS 'risk reduction' levee system with its new robust levees and floodwalls and massive multi-billion-dollar surge barrier." Pl. Br. 78. That argument further demonstrates that the plaintiffs' takings claim is essentially a challenge to the adequacy of the federal LPV levee system, because plaintiffs assert that the alleged taking ended only when the government built a more extensive system of levees. *See* pp. 2-8, *supra*.

As explained above, neither here nor in *Robinson* did any plaintiff claim that they could have averted catastrophic flooding if the LPV had not been built. Fundamentally, all of the claims here and in the consolidated tort litigation amount to the same thing: the plaintiffs wished that the LPV levees had been higher or stronger when Hurricane Katrina struck. Such structural improvements to the LPV levees were made as part of the multi-billion dollar HSDRRS project, which "substantially increased the height of the levees surrounding St. Bernard Polder to between 26 and 32 feet above mean sea level." Appx18333. But the fact that the prior LPV levees were not sufficient

to contain Hurricane Katrina's floodwaters does not amount to a Fifth Amendment taking.

III. The CFC erred in making a sua sponte award of compensation to the City of New Orleans, which is neither a party nor a member of the certified class.

More than half of the CFC's partial final judgment—$2.56 million—is an award to the City of New Orleans for lost property tax collections in 2006 and 2007. Appx20363-20364. As the government explained (Opening Br. 64 n.8), it is unclear whether that aspect of the CFC's partial final judgment is subject to appellate review at this time. But if it is, it clearly must be reversed. And the CFC's extraordinary award of damages to a non-party, on a theory that the CFC raised sua sponte and supported with evidence the court itself gathered after trial was completed, further illustrates the extent to which the CFC's liability and damages holdings departed from governing law.

The City of New Orleans is not a plaintiff in this case and is not within the St. Bernard Parish. Moreover, the flooding of the City during Hurricane Katrina had nothing to do with the breaching of the Reach 2 levees. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 195 (5th Cir. 2007) (explaining that approximately eighty percent of the City of New Orleans was submerged in water as a result of ruptures in other levees and floodwalls).

Plaintiffs argue that "a court may award damages according to a theory that neither party in that case addressed," Pl. Br. 72 (quotation marks omitted),

but they cite no precedent for an award of damages *to a non-party*—a remedy that plaintiffs lack standing to seek. The City itself has not appeared before this Court to defend the CFC's award. Indeed, the City may well have qualms about plaintiffs' takings theory which, as explained above, could expose the City itself to massive takings liability for hurricane flood damage. *See supra* pp. 36-39.

Furthermore, even if the CFC had authority to grant monetary relief to a nonparty, it erred in treating real estate taxes as a compensable property interest under the Fifth Amendment. *See* Opening Br. 66-67. The CFC cited no precedent supporting that result, and plaintiffs do not attempt to defend it.

IV. The CFC erred in refusing to offset the compensation owed to the landowners with the federal grants they received for hurricane assistance.

The CFC incorrectly refused to reduce the compensation it awarded Gwendolyn and Henry Adams, two private landowners, by the federal money that they received under grants from the Department of Housing and Urban Development (HUD) for rebuilding their home. *See* Appx20361. The amount of the grants exceeds plaintiffs' estimate of the fair market value of the Adams' property in 2005 when Hurricane Katrina struck. *See* Appx15016; see also Appx20351. The fact that the federal funds were distributed by the State of Louisiana does not change the fact that the funds were federal funds. The CFC's denial of an offset based on the United States' asserted lack of

contractual privity with the Adams (Appx20362) neglects that a court finding a Fifth Amendment taking must reduce compensation in the amount of benefits plaintiffs received in connection with the alleged taking to ensure that the plaintiffs do not receive a windfall. That obligation is neither limited by principles of contractual privity nor abrogated by the federal government's decision to allow the State to disburse the federal money. The government's obligation to pay just compensation requires that the property owner "be put in as good position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U.S. 369, 373 (1943). That payment of federal funds in an amount that *exceeded* the fair market value of the Adams' property more than satisfied that obligation.

Plaintiffs' suggestion (at 74) that the United States must instead recover the money from the Adams and/or the State in "collateral proceedings" would waste federal and state-government resources and would inadequately protect the federal fisc. Moreover, the fact that the federal government provided the grant money to allow the Adams plaintiffs to rebuild a house on the property does not restrict the offset to the cost of improvements, as plaintiffs contend (*id.*). After all, the CFC factored the value of the structure into its calculation of lost rent. *See* Appx20355. And as already mentioned, the grants were

greater than the property's fair market value at the time Hurricane Katrina struck.

V. The CFC erred in awarding St. Bernard Parish the amount of its flood-insurance payments under the "collateral source" rule.

The Federal Emergency Management Agency (FEMA) provided St. Bernard Parish with $5.5 million in grants for the Parish's three trial properties—an amount that far exceeded the $2.6 million in compensation that plaintiffs sought for those properties. Appx20360. The CFC correctly recognized that those grants should offset any compensation owed to the Parish. Appx20360-20361. But the CFC then borrowed the "collateral source" rule from tort law to award the Parish $893,363, which represented the amount by which the FEMA grants had been reduced to account for flood-insurance payments the Parish had received from another source. Appx20361.

Plaintiffs defend the CFC's application of the collateral-source rule. Br. 75-77. But they ignore a more fundamental point: Plaintiffs themselves sought only $2.6 million in just compensation for these properties, but FEMA paid them more than twice that amount in grants for the same properties. *See* Appx20360. Under these circumstances, the fact that FEMA reduced those grants by the amount of plaintiffs' flood insurance payments would be irrelevant even if the collateral-source doctrine applied. In the typical collateral-source case, the defendant seeks to reduce its obligation to pay by the

amount that the plaintiff received from another source. But that is not what is at issue here. The government is not asserting, for example, that the $2.6 million the Parish seeks in compensation should be reduced by the $893,363 that the Parish received in insurance payments. Instead, the point is that the federal government has already paid the Parish far more than the *full amount* of the $2.6 million that the Parish claims to be owed.

In any event, the collateral-source rule has no place in measuring just compensation under the Fifth Amendment, because the rationale for that rule is that the victim of "tortious or negligen[t]" conduct should be *overcompensated* to avoid giving a "windfall" to a "wrongdoer," *LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1372 (Fed. Cir. 2013). *See* Opening Br. 68-69. Indeed, the CFC's decision to apply the rule only reinforces the conclusion that it regarded the plaintiffs' claims as tort rather than takings claims. Plaintiffs try (at 76) to provide other rationales for the rule, but even assuming that the rule could properly apply to takings claims, the CFC here still abused its discretion in calculating the compensation owed to the Parish.[13]

[13] Plaintiffs contend (at 75) that a statement from the United States' trial-court brief disputing that the federal grants *themselves* were received from a collateral source waived the issue of the rule's applicability. Even if that were correct, the same brief made clear that the amount of the grants far exceeded the compensation that plaintiffs sought for three of the Parish trial properties. *See* Appx18102 ("Thus, the federal grants compensate Plaintiffs for the entire

VI. Plaintiffs' remaining cross-appeal arguments lack merit.

A. The CFC should not have compensated St. Bernard Parish at all, but if it did, any lost rent would have been correctly reduced to zero for most of the Parish's properties.

The CFC did not award lost rent to St. Bernard Parish because it determined that that the Parish's properties "had no rental value," Appx20358, and that they were held for public purposes, Appx20355. Instead, the CFC measured the Parish's compensation in two other ways, both of which were erroneous. First, as it did with the City of New Orleans, the CFC examined whether the Parish had lost tax revenue, and found that the Parish had not. Appx20364. Our opening brief (at 66-67) demonstrated that lost tax revenue is not an appropriate measure of just compensation in a Fifth Amendment case. Plaintiffs neither defend the CFC's use of lost tax revenue nor contend that the CFC abused its discretion in finding that the Parish did not lose tax revenue during the relevant time period. Second, the CFC improperly relied on the collateral-source rule to award the Parish just compensation in the amount of insurance payments it had received. But that approach was incorrect, as well. *See supra*; Opening Br. 67-69.

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amount of whatever compensation is due, and Plaintiffs' argument to the contrary * * * should be rejected.").

Lost rent is an appropriate measure of compensation for a temporary taking, and the United States never contended that the Parish's properties have no rental value merely because they are publicly held. Despite the multiple errors in its approach, however, the CFC did not need to calculate the lost rent owed to the Parish. Even setting aside the key point that no award of compensation was warranted for any plaintiff, the maximum compensation the Parish sought for three of its five properties was less than the amount of federal grants the Parish received to restore those properties. *See* Appx20360 (table); *see also* Appx17823, Appx15031, Appx15033, Appx15035. Those grants were appropriately considered as offsets, as explained *infra* at pp. 55-56 and in our opening brief (at 70-71), and any compensation to the Parish for those properties—in the form of lost rent or any other measure—should have been reduced to zero.[14]

[14] If all flooding were attributable to the United States, the government's appraiser determined that the combined lost rent for the Parish's two remaining properties would have been $11,282 per month. *See* Appx16434 ("Loss of Use" for Lots 110-115 and 6.58 Acres of Land), Appx16457. The plaintiffs never presented any evidence of the Parish-properties' lost rent.

B. The CFC did not abuse its discretion by determining that the plaintiffs' evidence of the amount that their land values were diminished was too speculative.

Plaintiffs contend that the CFC erred by declining to award them the amount by which their property values were diminished after Hurricane Katrina because, plaintiffs contend, a person seeking compensation for a temporary taking may recover the amount of depreciation attributable to the government's actions. Pl. Br. 79-80. Even assuming plaintiffs are correct about that general legal principle, however, they fail to establish that the CFC abused its discretion in rejecting plaintiffs' evidence of loss as "too speculative." Appx20349. Although the CFC acknowledged the testimony from plaintiffs' appraiser, Mr. Marshall, that property values had decreased after Hurricane Katrina, the CFC noted that the financial crisis in the housing market had also contributed to that loss. *Id*. Plaintiffs do not explain why the CFC's determination that the evidence was "too speculative" was an abuse of discretion, except to say that the government did not rebut Mr. Marshall's testimony on this issue. But "[n]othing in the rules or in our jurisprudence requires the fact finder to credit the unsupported assertions of an expert witness," regardless of whether they are specifically rebutted. *Rohm & Haas Co. v. Brotech Corp.*, 127 F.3d 1089, 1092 (Fed. Cir. 1997); *see Libas, Ltd. v. United States*, 193 F.3d 1361, 1366 (Fed. Cir. 1999) ("It would make little sense to say

that a trial court in its fact-finding role should accord much if any weight to expert testimony, the reliability of which is not established.").

C. Plaintiffs fail to show that awarding interest at the Treasury bill rate was an abuse of discretion.

Assuming for the sake of argument that an award of compensation was proper, plaintiffs fail to demonstrate that the interest rate chosen by the CFC was an abuse of the CFC's discretion.

Just compensation may include an award of interest from the date of the taking until payment. *See Albrecht v. United States*, 329 U.S. 599, 602 (1947); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923). This Court treats the question of the proper interest rate in a takings case as one of fact. *See Miller v. United States*, 620 F.2d 812, 837 (Ct. Cl. 1980). Here, the CFC awarded compound interest to plaintiffs from September 1, 2005, until payment, at the U.S. Treasury bill rate, which derives from a statute applicable to eminent domain cases. Appx20359; *see* 40 U.S.C. 3116. Applying that rate promotes uniformity for all types of condemnation claimants, as other CFC judges have recognized. *See*, *e.g.*, *Textainer Equip. Mgmt. Ltd. v. United States*, 99 Fed. Cl. 211, 223 (2011); *Vaizburd v. United States*, 67 Fed. Cl. 499, 504 (2005); *NRG Co. v. United States*, 31 Fed. Cl. 659, 670 (1994).

Plaintiffs argue that the CFC should have applied the higher interest rate found in the Moody's Composite Index of Yields on Aaa Long Term

Corporate Bonds. Pl. Br. 80-82. But their only testimony for that rate came from their appraiser, Mr. Marshall, whom the court found was "not competent" to testify about that issue. Appx20358-20359 n.19. In any event, the CFC found, Mr. Marshall merely adopted the instructions by plaintiffs' counsel on what rate to use when calculating interest. *Id.*; *see* Appx16962. Plaintiffs do not challenge either of those evidentiary findings. Regardless, the CFC found that it had already accounted for the delay in payment of compensation by awarding the plaintiffs their lost rental values for a substantial period of time. Appx20358-20359. That finding was not an abuse of discretion.[15]

D. Any compensation owed to St. Bernard Parish would properly be offset by the federal grants the Parish received for hurricane-recovery assistance.

Plaintiffs argue that the CFC erred by determining that St. Bernard Parish's compensation award could be offset by the federal grants that the Parish received to help it rebuild improvements on its properties after the

[15] Although plaintiffs cite two Court of Claims decisions selecting Moody's or similar indexes as providing the proper interest rates for claims arising prior to 1980 (Pl. Br. 82), this Court has long since discontinued the practice of adopting a uniform interest rate for all cases of a single era. *See Georgia-Pacific Corp. v. United States*, 640 F.2d 328, 366-67 (1980) (following prior case law and a policy favoring "uniformity of treatment" to calculate interest rates through 1979, but allowing trial court to undertake its own analysis on remand for later years); *see also Miller*, 620 F.2d at 840.

hurricane. Pl. Br. 82. The Parish received billions of dollars in such grants, including $6.42 million related to three of its five trial properties. Appx20359-20360. Plaintiffs contend that the federal money cannot be used to offset its compensation award because the grants were distributed through the State of Louisiana. But the fact that the grants were distributed by the State does not change the fact that the funds at issue were federal funds. *See* pp. 47-48, *supra* & Opening Br. 70-71.[16]

CONCLUSION

The CFC's judgment should be reversed.

Respectfully submitted,

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[16] Plaintiffs' contention that offset should be denied because the federal disaster relief was contingent upon the purchase of flood insurance lacks merit. Pl. Br. 82. Even if plaintiffs were correct that a requirement to purchase flood insurance diminished the value of the federal grants they received—which is far from obvious—plaintiffs have never attempted to quantify the amount of the diminution.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation in Fed. R. App. P. 28.1(e)(2)(A)(i) (Dec. 2015) because this brief contains 13,205 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b) (Mar. 2016).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Calisto MT.

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CERTIFICATE OF SERVICE

On June 9, 2017, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the electronic case filing system, which will serve electronic notice of the filing on all registered users of that system.

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