Nos. 2016-2301, 2016-2373

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.

On Appeal from the United States Court of Federal Claims in No. 1:05-CV-01119-SGB, Judge Susan G. Braden

BRIEF FOR NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, REASON FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, PROPERTY RIGHTS FOUNDATION OF AMERICA, NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, AND PROFESSOR JAMES W. ELY, JR., AS *AMICI CURIAE* IN SUPPORT OF THE PLAINTIFF-LANDOWNERS

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March 24, 2017

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

St. Bernard Parish Government, et al. **v.** United States

Case No. 16-2301, 16-2373

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ☒ (amicus) ☐ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
NFIB Small Business Legal Center	Same	None
Reason Foundation	Same	None
Southeastern Legal Foundation	Same	None
Property Rights Foundation of America	Same	None
Nat'l Assoc. of Revers. Prop. Owners	Same	None
Professor James W. Ely, Jr.	Same	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Mar 24, 2017
Date

/s/ Mark F. (Thor) Hearne, II
Signature of counsel

Please Note: All questions must be answered

Mark F. (Thor) Hearne, II
Printed name of counsel

cc: Counsel for Appellant and Appellees

Reset Fields

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INTEREST OF *AMICI CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. The typical NFIB member employs ten people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

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[1] As required by Fed. R. App. P. 29(a)(4)(E), we affirm this brief is not authored, in whole or part, by any party's counsel nor has any party or party's counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses. For example, NFIB Legal Center filed a brief in support of the landowner in *Arkansas Game & Fish Commission* v. *United States*, both in the U.S. Supreme Court and in the Federal Circuit on remand. 133 S.Ct. 511 (2012); 736 F.3d 1364 (2013).

Reason Foundation is a nonpartisan public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing and promoting libertarian principles and policies – including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason magazine, online commentary, and policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason files briefs on significant constitutional issues.

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. For forty years, SLF has advocated, both in and out of the courtroom, for the protection of private property interests from unconstitutional governmental

takings. See, *e.g.*, *Murray Energy Corp.* v. *United States Dep't of Defense*, 817 F.3d 261 (6th Cir. 2016), *cert. granted*, 137 S.Ct. 811 (2017). SLF frequently files *amicus curiae* briefs at both the state and federal level in support of property owners. See, *e.g.*, *Army Corps of Eng'rs* v. *Hawkes*, 136 S.Ct. 1807 (2016); *Suitum* v. *Tahoe Regional Planning Authority*, 520 U.S. 725 (1997); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); and *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992).

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

The National Association of Reversionary Property Owners (NARPO) is a non-profit 501(c)(3) educational foundation, whose primary purpose is to assist property owners in the education and defense of their property rights, particularly their ownership of property subject to right-of-way easements. See, *e.g.*, *National Ass'n of Reversionary Property Owners* v. *Surface Transp. Bd.*, 158 F.3d 135 (DC Cir. 1998), and *amicus curiae* in *Preseault* v. *I.C.C.*, 494 U.S. 1 (1990), and *Marvin M. Brandt Rev. Tr.* v. *United States*, 134 S.Ct. 1257 (2014).

Professor James W. Ely, Jr., is a professor of property law and history who has received national acclaim for his work as a legal historian and property rights expert. Professor Ely has authored books, treatises, and articles which have received widespread praise from legal historians and scholars, including *The Law of Easements and Licenses in Land* (with Jon W. Bruce), and *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). Most recently, in *Marvin M. Brandt Revocable Trust* v. *United States*, 134 S.Ct. 1257, 1260-61 (2014), the Supreme Court cited Professor Ely's scholarship in *Railroads and American Law* (2001).

This appeal involves an issue of tremendous importance to landowners whose land the Government takes by government-induced flooding.

STATEMENT OF THE ISSUE

Was the Court of Federal Claims (CFC) correct to conclude the Just Compensation Clause of the Fifth Amendment requires the federal government to compensate property owners when the government constructs and operates a navigational canal that the government knows (or should know) will flood the owners' land and the owners' land is subsequently flooded?

STATEMENT OF THE CASE

Beginning in the 1950s Congress directed the Army Corps of Engineers (Corps) to construct a navigational canal known as the Mississippi River Gulf Outlet (MRGO or MR-GO). Appx18302. The federal government built and maintained this navigational canal to provide ocean-going ships a shorter route from the Gulf of Mexico to the Port of New Orleans. But the Government was warned, and the Government knew or should have known, that MRGO would increase the risk that homes, businesses, and private property in St. Bernard Parish and New Orleans' Lower Ninth Ward would flood. Appx18312, Appx18344.[2]

MRGO and its surrounding structures created a funnel, focusing and intensifying the effect any approaching storm surge would have upon land in St. Bernard Polder. See Appx18344-18345 (describing the "funnel effect"). The Corps' design, construction, and operation of MRGO also

[2] We refer to the land flooded by the MRGO navigational canal as the "St. Bernard Polder." The CFC provides maps showing the specific location of this land as distinguished from other New Orleans property flooded during Hurricane Katrina. See Appx18308, Appx18309, Appx18311, Appx18315, Appx18319.

destroyed wetlands that had protected St. Bernard Polder from hurricane storm surge. Appx18313, Appx18349-18350, Appx18355. MRGO destroyed these protective wetlands by introducing salt-water from the ocean. This change in salinity ultimately killed (or greatly diminished) the native species of wetland vegetation that had buffered St. Bernard Polder from the ocean. Appx18313, Appx18345-18352, Appx18354-183564

The Corps' failure to maintain MRGO compounded the defects in the Corp's design and construction of MRGO. The originally-designed 650-foot-wide channel for ocean-going vessels increased to a half-mile-wide channel in parts by the 1980s. Appx18354, Appx10151. This increase in channel width and the continued use of this channel by large ocean-going ships exposed the surrounding levees to destructive storm surges and wakes. Moreover, the Government failed to "armor" the earthen berms on the edge of MRGO to protect them from erosion by the wake of the ships using the canal. Additionally, as the canal widened from its initial 650-feet in width to up to a half-mile in width, the "fetch" increased. "Fetch" is the open water over which the wind generates waves – the greater the fetch, the larger and more destructive the waves.

The same hurricane-force wind (120 miles-per-hour in the case of Katrina) produces vastly larger and more powerful waves on the opposing shoreline when the fetch is up to a mile, as opposed to 650 feet, exerting greater force against the levees.

A hurricane, even an exceptionally strong hurricane, making landfall in New Orleans was not unanticipated. See generally Erik Larson, *Isaac's Storm: A Man, a Time, and the Deadliest Hurricane in History* (2000) (describing the U.S. Weather Bureau's efforts to forecast the devastating hurricane that struck Galveston Island in September 1900 and killed more than six-thousand people). In 2005 Hurricane Katrina fulfilled these prophesies when it made landfall in New Orleans. Because of MRGO the owners' land in St. Bernard Polder flooded exactly as the government knew and was warned it would. After Hurricane Katrina, parts of St. Bernard Polder flooded again during Hurricane Rita and flooded again during severe storms after Hurricane Rita. All of this flooding resulted from the Government's design, construction, and operation of MRGO.

After Hurricanes Katrina and Rita, in 2009 the Government finally closed MRGO, constructed a barrier to prevent ocean-going vessels from using this canal, and built a system of levees, floodwalls, surge-barriers,

and other mitigation measures eliminating the flowage easement MRGO had previously imposed upon land in the St. Bernard Polder.

The CFC engaged in a fact-intensive analysis of the evidence and analyses produced by the Corps as well as substantial expert testimony. The CFC also considered the extensive evidence adduced in the related *Robinson* litigation in the United States District Court for the Eastern District of Louisiana. The District Court's findings were reviewed by the Fifth Circuit. See *In re Katrina Canal Breaches Consol. Lit.*, 647 F. Supp.2d 644 (E.D. La. 2009) (*Robinson I*); *In re Katrina Canal Breaches Lit.*, 673 F.3d 381 (5th Cir. 2012) (*Robinson II*); and *In re Katrina Canal Breaches Lit.*, 696 F.3d 436 (5th Cir. 2012) (*Robinson III*). The Government agreed to coordinate adjudication of the *Robinson* litigation with this litigation in the CFC. Appx18303, n.3.[3]

The Fifth Circuit embraced the District Court's factual findings in *Robinson I*. The Fifth Circuit also rejected the Government's argument

[3] The CFC and U.S. District Court judges "agreed that the federal tort and state negligence claims first should proceed to adjudication and final judgment. Thereafter, [the CFC] would convene a bench trial on the Takings Clause claim, but would not issue an opinion until any appellate review of the District Court's decision was final."

that the Government was immune from liability because the construction and operation of MRGO was a "flood-control" project:

> "[T]he negligently maintained MRGO acted upon the levees in a way that caused them to be breached during Hurricane Katrina, and, because MRGO was not a flood-control project and was separate from the [Lake Pontchartrain and Vicinity Hurricane Protection Plan], no immunity should attach under Section 702c."

Robinson II, 696 F.3d at 446.[4]

But the Government never compensated, nor even offered to compensate, the St. Bernard Polder landowners for flooding their property. So the owners brought this lawsuit asking the CFC to order the Government to justly compensate them as the Fifth Amendment guarantees.

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[4] The Fifth Circuit has already rejected this argument. "The dredging of MRGO was not a flood-control activity, nor was MRGO so interconnected with the LPV as to make it part of the LPV. Therefore, the flood waters that destroyed the plaintiffs' property were not released by any flood-control activity or negligence therein." *Robinson III*, 696 F.3d at 448. The court explained, "Some Katrina-related flooding was caused not by flood-control activity (or negligence therein) but by MRGO, a navigational channel whose design, construction, and maintenance cannot be characterized as flood-control activity." *Id.* at 444.

Following a fact-intensive analysis and extensive expert testimony, the CFC and the federal District Court both found these owners' land flooded because the Government designed, constructed and maintained the MRGO navigational canal. Specifically, the CFC said,

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

Appx18374.

The CFC concluded that, before Hurricane Katrina, "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 a substantially expanded and eroded MR-GO and the resulting destruction of wetlands that had shielded the St. Bernard Polder for centuries." Appx18375.

The Corps' management of the MRGO navigational canal is no different than the Corps' management of Clearwater Dam in *Arkansas Game and Fish Comm'n* v. *United States*, 133 S.Ct. 511 (2012). Indeed

the Corps' management of MRGO was far worse than its management of Clearwater Dam and the Corps was aware that its construction and operation of MRGO would flood these owners' land.

The CFC determined the value of that property the Government-induced flooding took from these Louisiana landowners. The CFC concluded these owners were entitled to compensation for the Government's taking of their property between August 2005 (when their land first flooded) and 2009, when the Government closed MRGO to navigational traffic. In its initial valuation decision the CFC determined eleven owners and the City of New Orleans were due just compensation of $5.5 million, plus interest. The compensation due the other St. Bernard Polder owners has not yet been determined.

The Government asks this Court to overturn the CFC's decision claiming the trial court did not properly weigh the evidence and expert testimony in concluding the Government caused the flooding. The Government also contends that, as a matter of law, the Government may design, construct, and maintain a navigational canal that foreseeably floods private property without having to compensate the owner.

SUMMARY OF ARGUMENT

The Government contends it may construct a navigation canal that the Government knows (or should know) will flood private property without the Government having a Fifth Amendment obligation to compensate the owners whose property the government-induced flooding inundated. More specifically, the Government contends it may flood privately-owned land for a "temporary period" with a "single" flood without any obligation to compensate the owner.

The Government also claims it is absolved from all liability for how the Government constructed and operated MRGO because Hurricane Katrina was the "real cause" of any flooding. This defense recalls the Supreme Court's repudiation of the criminal's argument that he cannot be found guilty of a violent crime even though he loaded the gun, pointed it at his victim, and pulled the trigger because "pulling the trigger on a gun is not a use of force because it is the bullet, not the trigger, that actually strikes the victim." *United States* v. *Castleman*, 134 S.Ct. 1405, 1415 (2014) (internal quotation omitted).

The Government's defense fails because the Government designed, built and constructed the MRGO navigation canal having been warned

that when a future hurricane inevitably arrived the owners' land would likely flood. The Government anticipated (or should have anticipated) the fact that the Government's construction and maintenance of MRGO would flood the land in St. Bernard Polder. By designing, constructing, and maintaining the MRGO navigation canal as it did, the Government imposed a flowage easement across these owners' land. When the inevitable flooding ultimately occurred, the Government cannot escape its constitutional obligation to justly compensate the owners by blaming the weather.

This Court should affirm the CFC's decision on these points. The CFC correctly applied this Court's and the Supreme Court's controlling Fifth Amendment jurisprudence.[5]

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[5] The CFC incorrectly ruled the rate of interest due the owners should be computed using the 52-week Treasury-Bill rate. The proper rate of interest according to a series of this Court's decisions is the Moody's Aaa rate. See Hearne, *et al.*, *The Fifth Amendment Requires the Government to Pay an Owner Interest Equal to What the Owner Could Have Earned Had the Government Paid the Owner the Fair-Market Value of their Property on the Date the Government Took the Owner's Property*, 1 Brigham-Kanner Property Rights Journal 3 (September 2012); see also *Love Terminal Partners* v. *United States*, 126 Fed. Cl. 389, 439 (2016) ("the court will … utilize the [Moody's Aaa rate] as the most appropriate measure of interest"); *Tektronix* v. *United States*, 552 F.2d 343, 352-53 (Cl. Ct. 1977), *cert. denied*, 439 U.S. 1048; *Miller* v. *United States*, 620

ARGUMENT

I. The CFC rightly ruled the Fifth Amendment requires the Government to justly compensate an owner when the Government floods an owner's land.

Government-induced flooding of an owner's property gives rise to a compensable taking for which the Fifth Amendment compels the Government to pay the owner just compensation. This has been settled law since before 1872. See *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 181 (1871) ("where real estate is actually invaded by superinduced additions of water, earth, sand, or other material … so as to effectively destroy or impair its usefulness, it is a taking, within the meaning of the Constitution").

Yet the Government asks this Court to rule contrary to this established constitutional doctrine, ignore two centuries of Supreme Court Taking Clause jurisprudence and rule contrary to the Supreme Court's recent holding in *Arkansas Game.* The Government also asks this Court to adopt a bizarre variant of the "one-bite-rule" limiting

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F.2d 712 (Ct. Cl. 1980); *Pitcairn* v. *United States*, 547 F.2d 1106, 1122 (Ct. Cl. 1976); *Georgia Pacific* v. *United States*, 640 F.2d 328 (Ct. Cl. 1980); *Hughes Aircraft Co.* v. *United States*, 86 F.3d 1566, 1572 (Fed. Cir. 1996), *rev'd on other grounds*, 520 U.S. 1183 (1997).

owners' right to be justly compensated when the Government floods their land.[6] According to the Government it may flood any owner's land one time for an indefinite "temporary" period without any obligation to compensate the owner.

The Government argues, "To warrant treatment as a taking, flooding – like any other physical invasion – must not only be the direct result of actions authorized by the Government, but must also be 'substantial and frequent' as opposed to '[i]solated invasions, such as one or two floodings[.]'" Gov't Br. p. 38. The Government cites *Eyherabide* v. *United States*, 345 F.2d 565, 569 (Ct. Cl. 1965), for this proposition.

The Government is wrong as a matter of fact and law.

The Government is factually wrong because the CFC found the Government took these owners' land for nearly four years, between

[6] The "one-bite-rule" holds that an owner is not responsible for a domesticated animal injuring another unless the animal has previously injured another person. See *Restatement (Third) of Torts* §23, comment (b); *Prosser or Torts*, ch. 10, §57, p. 441. See also *Nooney* v. *Pac. Express Co.*, 208 F. 274, 275-76 (8th Cir. 1913) ("Defendant contends that this case falls within the ancient rule of the common law … that every horse is entitled to one kick, the same as every dog is entitled to one bite. The rule … has not for years been looked upon with favor, and we do not think that it should be applied in any field outside of that which is covered by authority.").

August 2005 when the owners' land first flooded and June 2009, when the Government shut-down MRGO.[7] The CFC and the District Court found the Government's construction and operation of MRGO resulted in *multiple* flooding events of many owners' land during Hurricanes Katrina and Rita and subsequent severe storms. Appx18332-18334. The Government admits the owners' property was flooded "once during Katrina, and a second time the following month, when Hurricane Rita made landfall before the levees could be repaired." Gov't Br. p. 39.

The Government's argument is also wrong as a matter of law because an owner is entitled to compensation when the Government takes the owner's land even if the taking is temporary. If the Government floods private property for a season the constitutional command that the Government justly compensate the owner is just as compelling as when the Government permanently floods the owner's property.

[7] The owners rightly argued the taking should span the longer period between the initial flooding and June 2011, when the government mitigated the levees along MRGO and, thereby, eliminated the flowage easement. Appellees' Br. p. 78.

The Government's Fifth Amendment obligation to justly compensate an owner does not turn upon whether the Government *temporarily* or *permanently* takes the owners' property. Our Constitution requires the federal Government to pay the owner in both cases. In *Arkansas Game* the Supreme Court explained, "this Court's decisions confirm, if government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking." 133 S.Ct. at 515. The *duration* of the Government's taking relates to the *amount* of compensation the Government owes the owner not *whether* the Government must compensate the owner.

Stated another way, the Government can always give property back to an owner and government-induced flooding can always recede; but returning the property, or the floodwaters receding, does not mean the Government didn't take an owner's property in the first instance. And returning possession of the property to the owner does not mean the Government needn't pay the owner for the value of the property during that time the Government's action dispossessed the owner of his

property.[8] See *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 321 (1992) ("no subsequent action by the government can relieve it of the obligation to provide compensation for the period during which the taking was effective"); *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 337 (2002) ("we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking").

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[8] The Fifth Amendment requires the Government to pay the owner a full measure of compensation. *Monongehela Nav. Co.* v. *United States*, 148 U.S. 312, 325-26, 337 (1893) ("unless a full and exact equivalent for it be returned to the owner … [it cannot] it be said that just compensation for the property has been made"); see also *Jacobs* v. *United States*, 290 U.S. 13, 16-17 (1933) ("The concept of just compensation is comprehensive, and includes all elements, 'and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.'") (quoting *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 304 (1923)); *Olson* v. *United States*, 292 U.S. 246, 254-55 (1934). The Government may also have statutory liability for additional expenses and relocation costs. See Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §4654(c).

The Supreme Court extends this holding to cases involving flooding and [flowage] easements. See *United States* v. *Dickinson*, 331 U.S. 745, 751 (1947) (flooding of owner's land was a taking even though owner successfully "reclaimed most of his land which the Government originally took by flooding"); and *Arkansas Game*, 133 S.Ct. at 519. ("Because government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable.").

The Supreme Court made this same point in *Lucas* v. *South Carolina Coastal Comm'n,* 505 U.S. 1003, 1031, n.17 (1992), stating, "Of course, the State may elect to rescind the regulation and thereby avoid having to pay compensation for a permanent deprivation. But 'where the [regulation has] already worked a taking of all use of property, no subsequent action by the Government can relieve it of the duty to provide compensation for the period during which the taking was effective.'"[9]

[9] Quoting *First English*, 482 U.S. at 321.

This is not a remarkable holding. See *United States* v. *Westinghouse*, 339 U.S. 261, 268 (1950) ("So long as the duration of the Government's occupancy is undetermined, the District Court must necessarily retain the case for the periodic determination and payment of rental compensation."); *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 16 (1949) ("since the Government for the period of its occupancy of petitioner's plant has for all practical purposes preempted the trade routes, it must pay compensation for whatever transferable value their temporary use may have had"); *Yuba Natural Resources, Inc.* v. *United States*, 904 F.2d 1577, 1580-81 (Fed. Cir. 1990) ("In the case of a temporary taking, however, since the property is returned to the owner when the taking ends, the just compensation to which the owner is entitled is the value of the use of the property during the temporary taking, *i.e.*, the amount which the owner lost as a result of the taking."). See also *United States* v. *General Motors*, 323 U.S. 373, 382 (1945) (holding the Fifth Amendment compels the Government to pay a fair market rental value when the Government takes the owner's warehouse for a temporary period).

Here the Government took these St. Bernard Polder owners' property by flooding their land and imposing a flowage easement across their land. This was government-induced flooding which both the CFC and the District Court for the Eastern District of Louisiana found the Government foresaw when it designed, built, and operated the MRGO navigational canal. This government-induced flooding began in August 2005, when the anticipated flooding occurred and these owners' land was inundated, expelling the owners from their land for weeks or months. See, *e.g.*, 121 Fed Cl. at 746. The flooding continued with Hurricane Rita and subsequent severe storms and the flood risk did not abate until the Government shut MRGO down and, in 2011, mitigated the floodway MRGO created across these owners' land.

The Government seeks succor from this Court's 1965 decision in *Eyherabide* but fails to reconcile its reading of *Eyherabide* (which does not support the Government's view of the case) with the Supreme Court's 2012 decision in *Arkansas Game*. The Government also makes the same mistake it made in *Arkansas Game* by resting its "we don't have to pay for temporarily flooding owners' land" argument upon *Sanguinetti* v. *United States*, 264 U.S. 146 (1924), and *United States* v. *Cress*, 243 U.S.

316 (1917). *Sanguinetti* and *Cress* were cases where "the Government did not … have 'any reason to expect that such [a] result would follow' from the construction of the canal." *Arkansas Game*, 133 S.Ct. at 520 (quoting *Sanguinetti*, 264 U.S. at 148). In *Arkansas Game* the Supreme Court reversed this Court and explicitly – and emphatically – rejected the Government's argument that one-time or temporary floods are not compensable.

In *Arkansas Game* the Supreme Court also noted that *Sanguinetti* was limited to cases where "the property was subject to seasonal flooding prior to the construction of the canal, and the landowner failed to show a causal connection between the canal and the increased flooding." 133 S.Ct. at 520. *Sanguinetti* does not apply here because the flooding of these St. Bernard Polder landowners' property was foreseen by the Government. Not only that, the CFC and District Court found a direct causal connection between the Government's construction of MRGO and the subsequent flooding of the St. Bernard Polder and the land was not subject to seasonal flooding.

Sanguinetti does not exonerate the Government of its constitutional duty to compensate these owners because, in *Sanguinetti*, the Court's

decision was explicitly premised upon the finding that the flooding was not foreseeable and, in *Sanguinetti*, the plaintiffs could not "show a causal connection between the canal and the increased flooding." *Arkansas Game*, 133 S.Ct. at 520.

After reviewing the extensive evidence and testimony in the *Robinson* litigation and after presiding over a second trial with additional expert testimony, the CFC found (as did the District Court in *Robinson I*) that since the 1950s the federal Government was repeatedly warned that building and operating MRGO would flood St. Bernard Polder landowners' property.

II. The CFC correctly found that government-induced flooding of the owners' land in St. Bernard Polder was a taking for which the Constitution compels the federal Government to justly compensate the owners.

The CFC held, "Plaintiffs established that the Army Corps of Engineers' construction, expansion, operation, and failure to maintain the [MRGO] effected a temporary taking by increasing storm surge and flooding of Plaintiffs' properties during Hurricanes Katrina and subsequent hurricanes and severe storms." Appx18338. The CFC further found the Government was told the Corps' design, construction,

and operation of MRGO would substantially increase the likelihood these owners' property in St. Bernard Polder would flood. See Appx18311-18326 (discussing the history of MRGO since 1958 including the repeated studies and warnings that the construction and operation of MRGO significantly increased the risk of private-owned land in St. Bernard Polder would flood).

In *Robinson I* the District Court held,

> [T]he Court finds that the Corps' negligent failure to maintain and operate the MRGO properly was a substantial cause for the fatal breaching of the Reach 2 Levee and the subsequent catastrophic flooding of the St. Bernard Polder occurred. This Court is utterly convinced that the Corps' failure to provide timely foreshore protection doomed the channel to grow to two to three times its design width and destroyed the banks which would have helped to protect the Reach 2 Levee from front-side wave attack as well as loss of height. In addition, the added width of the channel provided an added fetch which created a more forceful frontal wave attack on the levee."

647 F. Supp.2d at 697.[10]

[10] The District Court added, "The loss of wetlands and widening of the channel brought about by the operation and maintenance of the MRGO clearly were a substantial cause of plaintiffs' injury." *Id.* at 730–31. Further, "The failure to maintain the MRGO properly compromised the Reach 2 Levee and created a substantial risk of catastrophic loss of human life and private property due to this malfeasance. Nothing the Corps has introduced into evidence tips the balance in its favor." *Id.* at 732.

The evidence and expert testimony in the *Robinson* litigation demonstrated that, but for the Government's negligent design, maintenance and operation of the MRGO canal, the owners' property in St. Bernard Polder would not have flooded. *Robinson I*, 647 F. Supp.2d at 685 (citing the expert testimony of Dr. Bea). The District Court rejected the Government's contrary testimony. "While the computer programs used by the Government to prove causation were substantially analogous to those used by plaintiffs, after hearing the testimony and having reviewed the expert reports presented, the Court finds that some of the Corps' models are critically compromised by the use of input data that has been overly 'scaled' to obtain the results. The reason for such a finding is that many of the Corps' 'facts' or inputs are controverted by hard evidence presented in this case." *Id.* at 687.

The Government knew its creation and operation of MRGO meant the owners of land in the adjoining parish would be at increased risk of flooding:

> [I]t is clear from the testimony and documentary evidence that the Corps knew at least from the early 1970's that the MRGO was endangering the Chalmette Unit Reach 2 Levee. It knew that a primary source of the devastating shoaling was as a result of the wave wash that occurred with each ship that navigated the channel. ... As to the north shore, *the callous*

and/or myopic approach of the Corps to the obvious deleterious nature of the MRGO is beyond understanding.

Robinson I, 647 F. Supp.2d at 665-66.[11]

The District Court concluded "as overwhelmingly demonstrated at trial, this subsequent erosion resulting in the width of the channel increasing by more than 3 times its authorized width was caused by the Corps' failure to armor the banks of the MRGO to prevent 1) boat wakes causing erosion of the banks; 2) excavation and maintenance dredging causing bank slumping; and 3) saltwater intrusion killing vegetation and promoting organic decay." *Id.* at 671.

The Fifth Circuit did not overturn these factual findings on appeal but rather affirmed the District Court's factual conclusions. "The district court's careful attention to the law … allows us to uphold its expansive ruling in full, excepting our minor restatement of FCA immunity." *Robinson II*, 673 F.3d at 399. As the CFC noted, the Fifth Circuit "decided to consider the Government's petition for rehearing, withdrew its prior opinion, and reversed the District Court's legal ruling that the Army Corps was not immune from claims arising from levee breaches

[11] Emphasis added.

caused by MR-GO under the discretionary function exception to the Federal Tort Claims Act. In doing so, however, *the District Court's factual findings were not disturbed.*" Appx18304 (citing *Robinson III*, 696 F.3d at 441-43) (emphasis added). And the Fifth Circuit found, "The [district] court issued its impressive rulings in thorough opinions." *Id.* at 443. The Fifth Circuit found:

> The Corps' delay in armoring MRGO allowed wave wash from ships' wakes to erode the channel considerably, destroying the banks that would have helped to protect the Reach 2 levee (in the Chalmette Area Unit) from front-side wave attack and loss of height. The increased channel width added more fetch as well, allowing for a more forceful frontal wave attack on the levee. *MRGO's expansion thus allowed Hurricane Katrina to generate a peak storm surge capable of breaching the Reach 2 levee and flooding the St. Bernard polder.*

Id. (emphasis added).

The CFC admitted much of the District Court record in *Robinson*, a decision the Government has not challenged on appeal, and the CFC then independently weighed all of the evidence produced in both cases. The CFC's weighing of this evidence and expert testimony is a finding of fact which is reviewed for clear error. *Otay Mesa Property, L.P.* v. *United States*, 779 F.3d 1315, 1321 (Fed. Cir. 2015). The CFC's evidentiary rulings are reviewed under an abuse of discretion standard. *Murakami*

v. *United States*, 398 F.3d 1342, 1346 (Fed. Cir. 2005). The Government offers nothing to support this Court overturning the CFC's and the District Court's extensive fact-finding as clear error nor overturning these lower courts' evidentiary rulings as an abuse of discretion.

III. Paying owners for that property the Government takes may be costly, but it is a not defense to the constitutional command that the Government must justly compensate owners when it takes their property.

The Government is exercised about the prospect of having to pay these Louisiana landowners whose property the Government flooded. According to the Government, the Just Compensation Clause of the Fifth Amendment could prove quite expensive if the Government actually has to pay owners for that property it has taken from them. So be it. Complying with the Constitution has never been an argument to avoid complying with the Constitution.

In virtually every takings case the Government invokes a slippery slope argument seeking to escape its constitutional obligation to justly compensate owners when the Government takes their property. "Gee, if we (the Government) actually have to pay owners when we take their property or flood their land, that could get expensive."

The first response is that, yes, it could be expensive. So don't take or flood private property if you don't want to pay for it. The second response is that having to comply with the Fifth Amendment of the United States Constitution and compensate an owner when the Government takes private property has *never* been a defense the Government can assert to avoid its obligation to justly compensate an owner. See *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). See also *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415-16 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

In *Arkansas Game* the Supreme Court explained,

> The slippery slope argument, we note is hardly novel or unique to flooding cases. Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction. While

> we recognize the interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases. The sky did not fall after *Causby*, and today's modest decision augurs no deluge of takings liability.

133 S.Ct at 521.[12]

So too here. Compensating the owners of that land in the St. Bernard Polder whose property the Government flooded will neither bankrupt our Republic nor is paying these owners contrary to the demand of the Fifth Amendment.

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[12] Citing *United States* v. *Causby*, 328 U.S. 256, 275 (1946) (Black, J., dissenting), and *Lorretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 455 (1982).

CONCLUSION

"The court analogized MRGO to a Navy vessel that, as a result of negligent operation, crashes through a levee, causing a flood.... The district court's naval analogy is apt."

Robinson III, 696 F.3d at 446-47.

The Fifth Amendment provides, "No person shall be … deprived of life, liberty, or property … nor shall private property be taken for public use, without just compensation." The CFC rightly found this provision of our Constitution requires the Government to compensate these St. Bernard Polder landowners whose property the Government flooded by its construction and operation of the MRGO navigational canal. The CFC's decision faithfully follows and applies this Court's and the Supreme Court's Taking Clause jurisprudence. The CFC's decision is premised upon a factual record four Article III judges had reviewed and confirmed.[13]

This Court should affirm the CFC's decision.

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[13] U.S. District Court Judge Stanwood R. Duval, Jr., and three judges of the Fifth Circuit, reviewed and accepted the factual record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by ARENT FOX LLP, counsel for Appellant to print this document. I am an employee of Counsel Press.

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March 24, 2017

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