No. 18-359

In the
Supreme Court of the United States

ST. BERNARD PARISH, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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

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

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioners St. Bernard Parish Government, et al.[1]

PLF was founded over 45 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or amicus curiae in several landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See*, *e.g.*, *Knick v. Twp. of Scott, Pa.*, No. 17-647 (U.S. Sup. Ct. filed Oct. 31, 2017); *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF has offices in Florida, California, Washington, and the District of

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Columbia and regularly litigates matters affecting property rights in state courts across the country. PLF believes its perspective and experience with property rights litigation will aid this Court in the consideration of the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises an important question of federal constitutional law upon which the lower federal courts and state courts of last resort are split. Specifically, it asks whether government inaction, which results in the physical invasion of private property, can give rise to a taking where the consequence of its inaction is foreseeable. This Court's physical takings cases indicates that the answer to this question should be "yes," because takings jurisprudence is rooted in the understanding that the government is liable to the extent that it actually causes private property to be physically invaded or occupied. *See Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1871).

In the decision below, however, the Court of Appeals for the Federal Circuit held that "[o]n a takings theory, the government cannot be liable for failure to act, but only for affirmative acts by the government." App. 10a. The Federal Circuit then dismissed St. Bernard Parish's takings claim because it was based, in part, on the U.S. Army Corps of Engineers' failure to maintain certain levees and navigational channels in New Orleans—which resulted in the massive flooding experienced after Hurricane Katrina. Due to the per se nature of its "government action" rule, the Federal Circuit reached its decision without considering the unique facts that

had convinced the Court of Federal Claims to conclude that a combination of acts and omission by the Corps resulted in "imminent" risk of "injury by flooding." App. 159a. This Court should grant review to address the substantial injustice that the Federal Circuit rule worked on all of the individuals who temporarily lost their homes as a result of the Corps' actions and omissions.

Review is additionally warranted because the Federal Circuit rule directly conflicts with this Court's admonition that takings cases must be decided on the "'particular circumstances of each case,' and not by resorting to blanket exclusionary rules." *Arkansas Game & Fish Comm'n*, 568 U.S. at 37 (citations omitted). The case-specific analysis required by *Arkansas Game & Fish* is essential to the purpose of the Takings Clause, which is to provide just compensation when a government policy impacts private property in a manner that is functionally indistinguishable from a condemnation action. *Id.* at 31. Guidance from this Court is necessary because there is longstanding confusion among lower federal courts and state courts of last resort on the question whether government omission or inaction can rise to the level of a taking.

Furthermore, the Federal Circuit's decision is premised on an obvious mistake. The court cited a single sentence from *United States v. Sponenbarger*, 308 U.S. 256 (1939), to "establish that takings liability does not arise from government inaction or failure to act." App. 12a. But that decision, when read in its entirety, does not address government inaction and cannot support such a broad, categorical rule. *Arkansas Game & Fish*, 568 U.S. at 35 ("We resist

reading a single sentence unnecessary to the decision as having done so much work.").

Review of the Federal Circuit decision is also warranted because the "government action" rule is both unnecessary and irrational. The federal and state courts are well-equipped to distinguish those government omissions that result in a taking from those that do not, without relying on per se rules. And, as is shown by the facts below, the question whether a government policy qualifies as "action" or "inaction" is often complex and unclear, inviting arbitrary decisions. Such an imprecise and unpredictable standard should not stand between a person and his right to seek just compensation when a government policy results in the physical invasion of his home.

For the reasons set forth below, this Court should grant the Parish's petition.

REASONS FOR GRANTING THE WRIT

I

THIS CASE RAISES AN IMPORTANT FEDERAL QUESTION AS TO WHETHER DAMAGE TO PRIVATE PROPERTY CAUSED BY GOVERNMENT INACTION MAY CONSTITUTE A COMPENSABLE TAKING

The Takings Clause is intended to protect owners, not the government. *Pumpelly*, 80 U.S. at 177 (The Takings Clause was "adopted for protection and security of rights of the individual as against the government."). In the decision below, however, the Federal Circuit adopted a rule that absolves the government of its obligation to pay just compensation when its inaction or omissions result in substantial

and foreseeable damage to private property—without regard to the effect on property owners. App. 10a. This rule "perverts" the Takings Clause "into a restriction upon the rights of the citizen" (*Pumpelly*, 80 U.S. at 177-78), and directly conflicts with this Court's insistence that "[f]looding cases, like other takings cases, should be assessed with reference to the 'particular circumstances of each case,' and not by resorting to blanket exclusionary rules." *Arkansas Game & Fish*, 568 U.S. at 37 (quoting *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958) (citing *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922))).

This Court's insistence that takings claims be considered on their individual merits is based on the fundamental principle that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner."[2] *Arkansas Game & Fish*, 568 U.S. at 31 (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (citing *United States v. Pewee Coal Co., Inc.,* 341 U.S. 114, 115 (1951))); *see also Pumpelly*, 80 U.S. at 181 ("[W]here real estate is actually invaded by superinduced additions of water,

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[2] A physical invasion "eviscerates the owner's right to exclude" others from entering or using his property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). In practical effect, that owner has lost "one of the most essential sticks in the bundle of rights that are commonly characterized as property . . . ." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Because the owner's rights are irreparably harmed by physical invasion, she must be compensated. *See Lingle*, 544 U.S. at 539 (a permanent physical invasion, "however minor," will always effect a taking and requires compensation).

earth, sand, or other material, . . . so as to effectively destroy or impair its usefulness, it is a taking.").

Importantly, the government's liability for a physical taking exists without regard to the reason for the invasion. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (public purpose irrelevant); *United States v. Causby*, 328 U.S. 256, 266-68 (1946) ("[I]t is the character of the invasion that determines the question whether it is a taking."); *Preseault v. United States*, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (expectations not considered in physical invasion case). That is because, once the property has suffered a physical invasion by the government, it has been taken. *United States v. Welch*, 217 U.S. 333, 339 (1910) ("But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end."); *see also* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev. 1393, 1464 (1991) (Flooding that infringes on private property is appropriative in nature.). Thus, the question whether a government policy (such as a decision not to repair a failing structure) can be characterized as "action" or "inaction" cannot in and of itself determine the distinctly different question whether that choice effected a taking.

Indeed, from a practical perspective, consideration of case-specific facts is necessary in such a circumstance because the government often decides to take no action (despite foreseeable risk) in order to advance some other goal, such as preserving the public fisc. Such a decision, if it results in a physical invasion, directly implicates the purpose of the Takings Clause, which "is 'designed to bar

Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Arkansas Game & Fish*, 568 U.S. at 31 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Because of "the nearly infinite variety of ways in which government actions or regulations can affect property interests," this Court has repeatedly admonished the lower courts against the adoption of per se rules in takings cases. *Arkansas Game & Fish*, 568 U.S. at 31 ("[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking."); *see also Tahoe-Sierra Preservation Council*, 535 U.S. at 321 (Because takings cases "depend upon the particular circumstances of the case[,]" courts must resist "'[t]he temptation to adopt what amount to *per se* rules in either direction.'" (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring))). Flooding resulting from a government omission that causes substantial harm to the property is no different in kind from an invasion caused by an affirmative act: both have the effect of appropriating an owner's rights in his or her land for a public benefit. Under the principles discussed above, both circumstances may require payment of just compensation. Review is warranted and should be granted.

II

THE REASONING UNDERLYING THE FEDERAL CIRCUIT RULE IS PREMISED ON AN OBVIOUS MISTAKE THAT IS LIKELY TO REPEAT ITSELF

Review is additionally warranted because the Federal Circuit decision is premised on an obvious mistake. Specifically, the court read a single sentence from *Sponenbarger*, 308 U.S. 256, to establish a per se rule "that takings liability does not arise from government inaction or failure to act." App. 12a.

Sponenbarger says no such thing. Indeed, the sentence that the Federal Circuit relied on states only that "[w]hen undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect." App. 12a (quoting *Sponenbarger*, 308 U.S. at 265). That sentence says nothing about government inaction or inaction in the face of a foreseeable risk of damage to private property. Nor does it even hint at establishing a categorical exclusionary rule. Thus, it is necessary to determine what was actually decided by *Sponenbarger*. *Arkansas Game & Fish*, 568 U.S. at 36 ("[T]he first rule of case law as well as statutory interpretation is: Read on.").

Doing so reveals that *Sponenbarger* did not involve an allegation that government inaction or omissions constituted a taking. Instead, the complaint in *Sponenbarger* alleged that the government's decision to direct a spillway toward the plaintiff's property as part of a larger flood control project constituted an "'intentional, additional, occasional flooding,

damaging and destroying' of her land." 308 U.S. at 260 (quoting complaint). This Court decided the case on the unremarkable proposition that a landowner cannot establish a taking by inverse condemnation if "the Government has not subjected respondent's land to any additional flooding above what would occur if the Government had not acted . . . ."[3] *Sponenbarger*, 308 U.S. at 266. Applying this principle, *Sponenbarger* concluded that there was no taking in that case based on the lower court's finding that "[t]he Government has not subjected [the] land to any additional flooding, above what would occur if the Government had not acted . . . ."[4] *Id.*

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[3] *Sponenbarger* also set out

> a relative benefits test which espouses that even if the government action results in greater flooding, "if Governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities in substance take nothing from the landowner."

Big Oak Farms, Inc. v. United States, 131 Fed. Cl. 45, 47 (2017) (quoting *Sponenbarger*, 308 U.S. at 266-67).

[4] In support of this conclusion, the Court found:

> This record amply supports the District Court's finding that the program of improvement under the 1928 Act had not increased the immemorial danger of unpredictable major floods to which respondent's land had always been subject. Therefore, to hold the Government responsible for such floods would be to say that the Fifth Amendment requires the Government to pay a landowner for damages which may result from conjectural major floods, even though the same floods and the same damages would occur had the Government undertaken no work of any kind.

The single sentence relied on by the Federal Circuit cannot establish a per se rule that is wholly unrelated to this Court's decision in *Sponenbarger*. *Arkansas Game & Fish*, 568 U.S. at 35 ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." (quoting *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 399 (1821))). The Federal Circuit's error in this regard is obvious and warrants reversal. But there is more.

The lower court's error is not an isolated event. Shortly after deciding this case, the Federal Circuit reversed another significant takings verdict based on the same per se "government action" rule. *See Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1341-42 (Fed. Cir. 2018). There, the Court of Federal Claims found that the enactment of a federal law severely restricting the use of an airfield (and intended to promote growth of a neighboring airfield) effected a regulatory taking of the targeted airfield's and a physical taking of the terminal. *Id*. at 1336. The legislation reduced the total number of gates allowed at the disfavored airfield and committed the local government to acquire and demolish another commercially viable gate there. *Id* at 1339. After a full trial, the court awarded $133.5 million in compensation. *Id*.

> So to hold would far exceed even the "extremist" conception of a "taking" by flooding within the meaning of that Amendment. For the Government would thereby be required to compensate a private property owner for flood damages which it in no way caused.

Sponenbarger, 308 U.S. at 265.

On review, the Federal Circuit characterized the federal government's role in this dispute as one of "inaction" because the legislation itself did not take Love Terminal's property—it was the consequence of the legislation remaining in effect that gave rise to the takings. *Id.* at 1341. Thus, the Federal Circuit rephrased Love Terminal's takings claims as alleging that the federal government's "failure to repeal" the harmful legislation constituted a taking. *Id.* The court then held that claims based on government inaction or omissions are categorically barred based on *St. Bernard Parish* and *Sponenbarger*. *Id.* at 1341-42. The ease with which the Federal Circuit rephrased Love Terminal's takings claim to allege government inaction shows how quickly this baseless rule will proliferate if left unreviewed.

III

THE FEDERAL CIRCUIT'S "GOVERNMENT ACTION" RULE IS UNJUST, UNNECESSARY, AND IRRATIONAL

The Federal Circuit's adoption of a per se exclusionary rule is manifestly unjust to all of the homeowners who sought compensation for the Corps' failure to maintain the levees and navigational channels. The trial court decision found that the Corps was well-aware that a failure to maintain levees and channels could result in massive flooding of homes located in St. Bernard Parish and the Lower Ninth Ward. Over the years, the Corps adopted a number of policies involving both action and inaction calculated to address this risk. But ultimately, the Corps failed to take the necessary steps to protect against "the substantially increased [risk of] storm

surge-induced flooding," resulting in massive floods after Hurricane Katrina. *St. Bernard Parish Gov't v. United States*, 121 Fed. Cl. 687, 741 (2015) (concluding that the Corps' actions and omissions caused a temporary taking).

To the displaced homeowners, it did not matter whether the flooding resulted from an act, an omission, or a combination of acts and omissions—the consequence was the same: a government policy resulted in the physical invasion of their property and displacement from their homes. At the bare minimum, these homeowners are entitled to have their claims considered on the merits. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945) ("The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking."); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30 (1922) (When the government imposes a servitude on private property, compensation should be made.).

Review by this Court is additionally warranted because the Federal Circuit's "government action" rule is unnecessary because state and federal courts already have tests in place that are capable of determining whether a government's failure to act gives rise to a taking. For example, *Ridge Line, Inc. v. United States* holds that courts evaluating a physical taking claim must consider the "character of the invasion" and other relevant information to determine (1) whether the government intended to invade a protected property interest *or* whether the asserted invasion was the direct, natural, or probable result of government activity (this first prong is disjunctive),

and (2) whether the interference was substantial enough to rise to the level of a taking.[5] 346 F.3d 1346, 1354-55 (Fed. Cir. 2003) (favorably cited by *Arkansas Game & Fish*, 568 U.S. at 39); *see also Moden v. United States*, 404 F.3d 1335, 1343 (Fed. Cir. 2005) (refining the *Ridge Line* test to ask whether an injury is foreseeable as the "'direct, natural, or probable result'" of the government action, rather than simply whether the action was the "direct, natural, or probable cause" of the injury).

This test has been consistently applied to a wide range of claims alleging a physical invasion taking, including flooding cases. *See Cooper v. United States*, 827 F.2d 762, 763-64 (Fed. Cir. 1987). But, most importantly, courts have also applied this test to determine whether a failure to act by the government will give rise to takings liability. *See*, *e.g.*, *Fromm v. Vill. of Lake Delton*, 847 N.W.2d 845, 853-54 (Wis. Ct. App. 2014) (recognizing that some omissions may give rise to takings liability, but holding that "the type of failure to act alleged here" cannot give rise to a taking); *Illinois v. United States*, 19 Cl. Ct. 180, 186 (1989) (holding that a government failure to maintain bridges before transfer to the state effected a taking).

State courts also engage in a similar case-specific inquiry to determine takings liability where physical invasions were the result of government omissions.[6]

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[5] For an exhaustive history of this test, *see Hansen v. United States*, 65 Fed. Cl. 76, 95 (2005).

[6] Indeed, the Federal Circuit itself had previously refused to foreclose the possibility of takings based on inaction. *See Last Chance Mining Co. v. United States*, 12 Cl. Ct. 551, 557 n.7 (1987), *aff'd sub nom. Last Chance Min. Co., Inc. v. United States*, 846 F.2d 77 (Fed. Cir. 1988) ("A direct invasion of property might

See Bakke v. State, 744 P.2d 655, 656 (Alaska 1987) (stating that "an act or omission" can cause damage to property in an inverse condemnation case); *Arreola v. Cty. of Monterey*, 99 Cal. App. 4th 722, 744 (2002) (government may be liable for inverse condemnation where it "deliberately chose a course of action—or inaction—in the face of that known risk"). For example, takings liability has been found when affirmative decisions by a Sanitary Authority to construct sewer pipes of a particular size and grade—when coupled with failures to maintain and engage in foreseeably necessary improvements—caused repeated floodings of a basement with raw sewage. *In re Mountaintop Area Joint Sanitary Auth.*, 166 A.3d 553, 563 (Pa. Commw. Ct. 2017). Even where government acts and omissions are coupled with an exceptional storm event that might constitute an act of God, courts and juries have been charged with determining whether government acts and omissions were the foreseeable cause of flooding, such that a landowner was entitled to just compensation. *See Livingston v. Virginia Dep't of Transp.*, 726 S.E.2d 264, 276 (Va. 2012) (reversing summary judgment in favor of the government defendant, and requiring a factual inquiry into whether the flooding was a result of government acts and omissions).

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result from negligent operation of a bulldozer, for example. Here, however, the alleged results of inaction were neither intended nor a direct appropriation, confiscation, or invasion."). Takings liability has also been found through regulatory inaction. *See United Nuclear Corp. v. United States*, 17 Cl. Ct. 768, 774 (1989), *rev'd on other grounds*, 912 F.2d 1432 (Fed. Cir. 1990) (cataloging circuit court decisions finding takings liability for government regulatory inaction).

These federal and state cases demonstrate that takings can and do occur as a result of government inaction. They also illustrate how the case-specific inquiry required by *Arkansas Game & Fish*, 538 U.S. at 37, can effectively distinguish an omission that may give rise to a taking from one that will not, without resorting to disfavored exclusionary rules. Furthermore, these cases show that any attempt to draw a *uniform* distinction between acts and omissions—without regard to case-specific facts—will be impractical, unhelpful, and often arbitrary. *See* Lisa E. Heinzerling, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. Chi. L. Rev. 1048, 1057-63 (1986) (criticizing the act/omission analysis in the context of governmental responsibilities under the Constitution). That is because "it is possible to restate most actions as corresponding inactions with the same effect." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 612 (2012) (Ginsburg, J., concurring) (citing *Archie v. Racine*, 847 F.2d 1211, 1213 (7th Cir. 1988) (en banc)); *see also* Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 Mich. L. Rev. 345, 373 (2014) (The distinction between action and inaction can be unclear, or even nonexistent).

Certainly, there will be circumstances where a failure to act will result in unforeseeable and unintended consequences, thereby failing to satisfy *Ridge Line*'s threshold inquiry. But, just as certainly, there will be situations where an omission will directly bring about a foreseeable and/or intended outcome. And in that situation, there is no meaningful distinction between an act and an omission beyond the fact that the former is an active way of achieving a goal and the latter is the passive approach. *See State*

Bar of Texas v. Gomez, 891 S.W.2d 243, 252 (Tex. 1994) ("[T]he difference between acts and omissions in this highly unusual context seems semantic."); *see also* David A. Fischer, *Causation in Fact in Omission Cases*, 1992 Utah L. Rev. 1335, 1339 ("[A]s a matter of semantics, any omission can be characterized as part of a larger encompassing act."). This, alone, demands courts engage in a meaningful inquiry into the unique factual circumstances presented by each case to determine whether government inaction results in a taking.

CONCLUSION

Given the diverse circumstances under which a taking can occur, it is impossible to draw an invariable rule stating that a physical invasion can never effect a taking if the government acted in a passive, rather than active, manner. Such a rule would be overbroad and would result in meritorious claims being dismissed, and the owner denied his or her right to just compensation. For the foregoing reasons, PLF

respectfully requests that this Court grant St. Bernard Parish's petition for a writ of certiorari in order to reverse the Federal Circuit.

DATED: October, 2018.

Respectfully submitted,

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