No. 18-359

In the Supreme Court of the United States

ST. BERNARD PARISH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

During Hurricane Katrina, petitioners' properties were flooded when the federal flood control system known as the Lake Pontchartrain and Vicinity (LPV) Hurricane Protection Project breached, allowing storm-driven waters to inundate the region. Petitioners contend that portions of the LPV levees would not have breached if the Army Corps of Engineers had not constructed the Mississippi River-Gulf Outlet (MRGO) shipping channel in the 1950s, or had armored the banks of the MRGO against erosion before the 1980s. Petitioners therefore allege that the flood damage their properties suffered during Hurricane Katrina constitutes a taking by the United States under the Fifth Amendment, for which just compensation is due. The questions presented are:

1. Whether the court of appeals correctly held that petitioners failed to prove that the government caused their flood damage, because it is undisputed that petitioners' properties would have flooded to the same or a greater degree during Hurricane Katrina if the government had built neither the LPV nor the MRGO.

2. Whether the court of appeals correctly held, in the alternative, that petitioners could not premise their takings claim on an argument that the government should have armored the banks of the MRGO before the 1980s or should otherwise have modified the channel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 887 F.3d 1354. The opinion of the Court of Federal Claims (CFC) on liability (Pet. App. 28a-178a) is reported at 121 Fed. Cl. 687, and the opinion of the CFC on damages (Pet. App. 179a-272a) is reported at 126 Fed. Cl. 708.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2018. On July 8, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 31, 2018. On August 21, 2018, the Chief Justice further extended the time to and including September 17, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The New Orleans region, which is situated partially below sea level and surrounded and crisscrossed by bodies of water, has for centuries been subject to flooding from hurricanes. C.A. App. 18,308-18,309, 25,034-25,035; see Pet. App. 3a-5a. While the hurricane at issue in this case, Hurricane Katrina, did not strike until 2005, two federal projects, built decades earlier, are relevant here.

First, in 1956, Congress authorized the Army Corps of Engineers (Corps) to construct the Mississippi River-Gulf Outlet (MRGO) navigation channel. Pet. App. 4a. The MRGO, which was completed in 1968, provided a direct shipping channel between the port of New Orleans and the Gulf of Mexico. *Ibid.* The MRGO comprised two principal reaches. See Pet. 9 (Figure 2). Reach 1 extended from east to west, between the Inner Harbor Navigation Canal and the Gulf Intracoastal Waterway. C.A. App. 18,312, 18,318. Reach 2 extended northwest to southeast, from the eastward point of Reach 1 to the Gulf of Mexico. *Id.* at 18,318. The MRGO was closed to shipping traffic in 2009. Pet. App. 29a, 90a.

Second, while the MRGO was still under construction, in 1965, Congress authorized the Corps to construct a system of levees and floodwalls known as the Lake Pontchartrain and Vicinity (LPV) Hurricane Protection Project. Act of Oct. 27, 1965, Pub. L. No. 89-298, § 204, 79 Stat. 1077; see Pet. 8 (Figure 1) (depicting in red some of the LPV levees and floodwalls). The LPV project grew out of Congress's 1955 authorization for the Corps to study the need for additional hurricane protection in the Lake Pontchartrain area. Pet. App. 4a. The LPV includes levees parallel to both Reach 1 and Reach 2 of the MRGO. See Pet. 8 (Figure 1); see also Pet. App. 5a

("The levee system was designed to, and did, reduce the risk of flooding in New Orleans, including specifically along the banks of the MRGO.").

b. On August 29, 2005, Hurricane Katrina made landfall to the east of New Orleans as one of the most devastating hurricanes ever to hit the United States. A massive Category 3 storm with winds greater than 120 miles per hour, Hurricane Katrina generated the largest storm-surge elevations in the Nation's history. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 678 (E.D. La. 2009) (*Robinson I*), aff'd in part, rev'd in part, 696 F.3d 436 (5th Cir. 2012), cert. denied, 570 U.S. 926 (2013). "This surge was due to [Hurricane Katrina's] intensity, its size, its angle of approach to the coast, its speed," and the water depths and coastal shape of southeastern Louisiana. *Ibid.*

As the storm crossed the Gulf of Mexico and approached New Orleans, high-force winds increased the height of nearby water bodies by many feet, driving water against the federal levee system. C.A. App. 18,326-18,327. LPV levees and floodwalls were breached in many parts of New Orleans, and at one point, "approximately eighty percent of the city was submerged in water." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 195-196 (5th Cir. 2007), cert. denied, 552 U.S. 1182 (2008).

The flooding at issue here occurred when Hurricane Katrina's flood waters breached the LPV levees that parallel Reach 2 of the MRGO. As a result of the Reach 2 levee breaches, petitioners' properties in the St. Bernard polder (which comprises St. Bernard Parish and the Lower Ninth Ward) were flooded. C.A. App. 18,328.[1] A

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[1] A polder is a tract of low land reclaimed from a body of water. *In re Katrina Canal Litig.*, 696 F.3d 436, 443 n.3 (5th Cir. 2012), cert. denied, 570 U.S. 926 (2013).

month later, before the levees could be fully repaired, Hurricane Rita struck and again flooded the area. *Id.* at 18,332. With Congress's authorization, the Corps then constructed a new multi-billion dollar hurricane risk reduction system with barriers approximately twice as high as the LPV levees. Pet. App. 26a; C.A. App. 18,328, 18,332-18,333.

2. After Hurricane Katrina, property owners filed more than 400 lawsuits seeking to hold the United States liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, for damage caused by the flooding. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 443 (5th Cir. 2012) (*Robinson II*), cert. denied, 570 U.S. 926 (2013); Pet. App. 30a. The FTCA plaintiffs from the St. Bernard polder alleged that the Reach 2 levees would not have breached during Hurricane Katrina if the Corps had armored the banks of the adjacent MRGO shipping channel against erosion before the 1980s (when the Corps in fact did so, see *Robinson II*, 696 F.3d at 443). After the suits were consolidated and the district court conducted a trial with respect to several test properties, the court accepted the causation model offered by the plaintiffs' expert and concluded that, if the Corps had armored the banks of the MRGO channel against erosion before 1975, the Reach 2 levees would have lost less height; the waves generated by Hurricane Katrina would not have struck the Reach 2 levees with as much force; and the levees would have withstood Hurricane Katrina. See *Robinson II*, 696 F.3d at 441-443 (describing the district court's theory of causation); *Robinson I*, 647 F. Supp. 2d at 675 (declaring that "[p]roper armoring of the banks [of the MRGO] before 1975 would have been an effective method to stop the lowering of the protective elevation" of the levees). The court entered judgment for

the St. Bernard polder plaintiffs, but the Fifth Circuit reversed on the ground that the claims were barred by the FTCA's discretionary function exception. *Robinson II*, 696 F.3d at 454; see 28 U.S.C. 2680(a). This Court denied certiorari. *Lattimore* v. *United States*, 570 U.S. 926 (2013) (No. 12-1092).

3. In 2005, petitioners filed this class action in the Court of Federal Claims (CFC), alleging that Hurricane Katrina's flooding of properties in the St. Bernard polder was a Fifth Amendment taking of a flowage easement by the United States. Pet. App. 28a & n.1; C.A. App. 6863. The certified class includes the owners of approximately 30,000 properties who sought a total of $5 billion in compensation. C.A. App. 6896, 20,373; Gov't C.A. Br. 11.

Trial in this case was postponed until after adjudication and final judgment in the *Robinson* litigation. Pet. App. 30a n.3. Following the Fifth Circuit's decision there, the CFC took judicial notice of the *Robinson I* trial record. See *id.* at 38a n.4. In addition, the CFC held a four-day trial on liability, and a three-day trial on compensation for 11 of the 137 properties identified in the complaint. See *id.* at 184a-186a; Gov't C.A. Br. 11. In 2015, the CFC issued an opinion concluding that the Corps' "construction, expansions, operation, and failure to maintain the [MRGO] effected a temporary taking by increased storm surge and flooding of plaintiffs' properties during Hurricane Katrina and subsequent hurricanes and severe storms." Pet. App. 100a (capitalization and emphasis omitted). In 2016, the CFC awarded compensation of $5.46 million for the test properties, including a sua sponte award of lost real estate taxes to a nonparty, the City of New Orleans. *Id.* at 179a-272a; see *id.* at 7a-8a. The CFC entered partial final judgment. *Id.* at 269a-272a.

4. The government appealed, and petitioners cross-appealed on valuation issues. A unanimous panel of the court of appeals reversed the liability ruling. Pet. App. 1a-27a.

The court of appeals held that petitioners failed to meet their burden to establish that the government caused their injury. Pet. App. 14a. "In order to establish causation" in a takings case, the court explained, "a plaintiff must show that in the ordinary course of events, absent government action, plaintiffs would not have suffered the injury." *Ibid.* The court concluded that petitioners could not meet that burden here because it was undisputed that petitioners' properties would have flooded to the same or a greater degree during Hurricane Katrina if the government had not built the LPV. *Id.* at 14a-27a. Indeed, petitioners had "failed to present evidence comparing the flood damage that actually occurred to the flood damage that would have occurred" absent *both* the MRGO channel and the LPV flood control project. *Id.* at 16a; see *id.* at 16a-17a. "And the [CFC's] causation findings [likewise] took no account of the risk-decreasing impact of the LPV levee construction." *Id.* at 17a. Thus, the court explained, "there was a failure of proof on the key issue of causation." *Id.* at 27a; see *id.* at 3a.

The court of appeals rejected petitioners' argument that the LPV is "unrelated" to the MRGO, Pet. App. 21a, and should be "ignored in the causation analysis," *id.* at 25a. On the contrary, the panel explained, "the LPV project was directed to decreasing the very flood risk that [petitioners] allege was increased by the MRGO project." *Id.* at 21a. The LPV "included levees along the banks of MRGO, and the construction of the levees used some of the material dredged from MRGO."

Id. at 22a. "Avoiding flooding damage was the very objective of the system of levees." *Ibid.* Moreover, the court noted, petitioners' claim itself "rests on the assertion that the MRGO project undermined the LPV government flood-control project." *Ibid.*

The court of appeals also stated, in the alternative, that petitioners could not premise a takings claim on the government's failure to armor the banks of the MRGO against erosion before the 1980s or failure otherwise to modify the channel. Pet. App. 9a-13a & n.2. The court explained that although "the theory that the government failed to maintain or modify a government-constructed project may state a tort claim," it does not state a takings claim, which requires that the asserted invasion be "the direct, natural, or probable result of authorized government action." *Id.* at 10a.

The court of appeals did not reach the government's other grounds for reversal, including that the CFC's subsidiary findings do not support petitioners' theory of causation, and that—by the CFC's own account—the risk attributed to the MRGO was not foreseeable at any relevant point in time. See Gov't C.A. Reply & Resp. Br. 13-20, 28-33.

ARGUMENT

The court of appeals' alternative rulings are correct and do not conflict with any decision of this Court or of another court of appeals. Moreover, petitioners' takings claim fails for additional, fact-intensive reasons that the court of appeals did not reach. The petition for a writ of certiorari should be denied.

1. a. Hurricanes have repeatedly caused devastating property damage during our Nation's history, and they continue to do so. Never has the damage caused by such a natural disaster been deemed a taking of property by

the federal government mandating payment from the public fisc. The court of appeals had no occasion to decide whether any circumstances could exist in which flooding driven by a hurricane could be deemed a taking, however, because the panel unanimously and correctly rejected the takings claim alleged here on narrower causation grounds.

Petitioners attributed the flood damage they experienced from Hurricane Katrina instead to the combined effects of two federal projects: (1) the LPV flood control system and (2) the MRGO shipping channel. See Pet. App. 4a-6a, 22a. Petitioners claimed that LPV levees along the stretch of the MRGO known as Reach 2 would not have breached during Hurricane Katrina if the Corps had not built the MRGO. See *id.* at 22a (quoting petitioners' argument that "[a]bsent MRGO, the levees would not have breached, or at a minimum would have breached later") (citation omitted; brackets in original); see also, *e.g.*, Pet. 28; Pet. C.A. Corrected Principal & Resp. (Pet. C.A.) Br. 11, 48-53. Petitioners' central argument was that the federal government should have bolstered the LPV levees before Hurricane Katrina struck. And petitioners acknowledge that their expert faulted the Corps for failing to "bolster[]" "the LPV structures" to withstand the flood risks that petitioners ascribe to the MRGO. Pet. 15-16 (citation omitted).[2]

Petitioners' theory of causation fails on its own terms, even assuming that the theory is supported by the CFC's findings of fact (which it is not, see pp. 13-14, *infra*). The government had no obligation to construct

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[2] Similarly, petitioners argued below that the putative taking did not end until the Corps built a new hurricane risk reduction system with more "robust levees and floodwalls and [a] massive multi-billion dollar surge barrier." Pet. App. 26a (quoting Pet. C.A. Br. 78).

the LPV in the first place, nor did it have any obligation to bolster the LPV against any particular flood risks. *United States* v. *Sponenbarger*, 308 U.S. 256, 266 (1939). Indeed, petitioners did not dispute that their properties would have experienced the *same or greater* flooding from Hurricane Katrina if the Corps had not built the LPV. Pet. App. 16a. Thus, as in *Sponenbarger*, the "Government has not subjected [petitioners'] land to any additional flooding, above what" would have occurred "if the Government had not acted." 308 U.S. at 266. A takings claim therefore does not lie. *Ibid.*; see *id.* at 265 ("[T]o 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.").

Moreover, petitioners' "proof of causation rested entirely on the premise that it was sufficient to establish that [their] injury would not have occurred absent the construction and operation of the MRGO channel without taking account of the impact of the LPV flood control project." Pet. App. 16a. In other words, while petitioners contended that the government was required to take the MRGO into account in maintaining the LPV levees, they simultaneously argued that the court of appeals could not consider the LPV's risk-minimizing effect in determining whether a taking had occurred.

The court of appeals correctly rejected petitioners' invitation to ignore the existence of the LPV hurricane protection system in determining whether the government caused their flood damage. As the court noted, the LPV was built by the federal government at significant

taxpayer expense, Pet. App. 5a, and "[a]voiding flooding damage was the very objective of the levees," *id.* at 22a. Thus, "the LPV project was directed to decreasing the very flood risk that [petitioners] allege was increased by the MRGO project." *Id.* at 21a.

Petitioners' suggestion that the court of appeals should have ignored the LPV because it was "unrelated to" operation of the MRGO disregards their own argument on appeal. Pet. 29 (emphasis omitted); see Pet. 31-32 (attempting to distinguish *Sponenbarger* on this ground). Having made the breaching of the LPV levees the centerpiece of their appellate briefing, see, *e.g.*, Pet. C.A. Br. 1-2, 11-12, 16, 33, 38, 48-53; Pet. C.A. Reply Br. 1-2, petitioners cannot plausibly contend that the existence of the federal flood control project must be ignored.[3]

Petitioners' assertion (Pet. 33) that communities can reasonably rely on the efficacy of a flood control project, in isolation from other developments, is incorrect. Even if Congress had not specifically addressed that issue, it would be evident that there is no constitutional right to government protection from flooding. See *Sponenbarger*, 308 U.S. at 266-268. But in fact, when Congress authorized the construction of federal flood control

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[3] Petitioners thus gain no ground in arguing (Pet. 37-38) that the Court of Claims and Federal Circuit decisions cited by the Federal Circuit in this case are distinguishable because they addressed different aspects of a "single" project. Pet. 37 (emphasis omitted). In any event, petitioners' suggestion that the decision below conflicts with prior decisions of the Federal Circuit (or its predecessor the Court of Claims), even if correct, would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

works for the Mississippi Valley following the catastrophic Mississippi floods of 1927, see *United States* v. *James*, 478 U.S. 597, 606 (1986), Congress specified 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." Flood Control Act of 1928, ch. 569, § 3, 45 Stat. 536 (33 U.S.C. 702c). That provision "safeguard[s] the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language." *James*, 478 U.S. at 608 (citation omitted); see *id.* at 604, 612. Petitioners are correct that the Fifth Amendment prevents 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." Pet. 2 (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). But in light of the plain text of the Flood Control Act, it would be neither fair nor just to require federal taxpayers to pay compensation for flood damage that occurs when a federal levee system fails to prevent flooding from a hurricane of historic dimensions.

Petitioners err in contending (Pet. 4) that the panel adopted a novel "categorical rule" that requires courts "to blind themselves to the actual cause of the flooding." See Pet. 32. The "actual cause" of the flooding in this case was Hurricane Katrina, which caused LPV levees and floodwalls to breach in many parts of New Orleans.

None of the decisions of this Court on which petitioners rely (Pet. 33-37) suggests that the federal government can be held liable for a taking when a federal flood control project fails to prevent flooding from a hurricane. *Arkansas Game & Fish Commission* v. *United States*, 568 U.S. 23 (2012), involved not a hurricane, but the Corps' routine, scheduled release of waters from a

dam. Although the resulting overflow in that case was "flooding" of a sort, it was wholly different in character than the flooding caused by a catastrophic storm. Even in that quite different context of scheduled releases, this Court in *Arkansas Game & Fish Commission* held "simply and only[] that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." *Id.* at 38. Indeed, the Court did not hold that a taking had occurred, but rather remanded for further proceedings on that question. *Id.* at 40. And the Court emphasized that its "modest decision augurs no deluge of takings liability." *Id.* at 37.

Petitioners' reliance (Pet. 33-34) on *Danforth* v. *United States*, 308 U.S. 271 (1939), is also misplaced. That case specifically rejected the argument that "the retention of water from unusual floods for a somewhat longer period or its increase in depth or destructiveness by reason of the set-back levee, has the effect of taking." *Id.* at 286. Petitioners suggest that the decision below contravenes *Danforth* because the Court there asked "whether the set-back levee would lead to increased flooding relative to a but-for world that included a separate 'riverbank' flood control levee, and not whether it would lead to increased flooding relative to a world in which there were no flood protection levees at all." Pet. 33-34 (emphasis omitted). As petitioners concede, however (Pet. 34 n.7), the riverbank levee in *Danforth* was not built by the government. And the Court's opinion in *Danforth* does not suggest that the parties disputed the correct standard of causation.

The other cases on which petitioners rely are even further afield. Petitioners now cite (Pet. 34-37) *United States* v. *Reynolds*, 397 U.S. 14 (1970), *United States* v.

Fuller, 409 U.S. 488 (1973), and *Horne* v. *Department of Agriculture*, 135 S. Ct. 2419 (2015), but they did not rely on those cases in the court of appeals. And those decisions are not relevant here, because they concerned neither flood damage nor causation; instead, they applied a fair-market-value analysis to the distinct question of compensation. In *Reynolds*, 397 U.S. at 16-17, for example, the Court considered whether the government could obtain an offset of compensation owed for a condemnation because the plaintiff's property values were enhanced by another government project. See also *Horne*, 135 S. Ct. at 2432; *Fuller*, 409 U.S. at 492-493. By contrast, here, the government did not seek an offset for value that petitioners' properties derived from other federal projects; instead, it contended that the combined effect of the government's LPV and MRGO projects did not cause petitioners any injury during Hurricane Katrina, and so no taking occurred.[4]

b. Petitioners' theory of causation also fails on the independent ground that it is unsupported by the CFC's findings of fact (an argument that the government made below, see, *e.g.*, Gov't C.A. Reply & Resp. Br. 8-20, but the court of appeals did not reach). Petitioners assert that "*the CFC found* that absent MRGO, the LPV's Chalmette levee would have withstood Katrina's 'direct hurricane attacks from Lake Borgne' long enough to prevent the inundation of [p]etitioners' properties."

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[4] Petitioners' reliance (Pet. 35) on *United States* v. *Miller*, 317 U.S. 369, 376-377 (1943), is similarly flawed. *Miller* also concerned "standards for valuing property taken for public use." *Id.* at 370. For that reason, petitioners' sole citation to *Miller* in the court of appeals came in their discussion of whether the CFC should have awarded rental value for the Parish's properties, not in their analysis of liability. See Pet. C.A. Br. 79.

Pet. 28-29 (quoting Pet. App. 109a) (emphasis added). But the CFC made no such finding. On the page of the opinion petitioners cite, the CFC simply quoted a 1984 document that made no reference to either the LPV or to a hurricane that would not strike for another two decades. See Pet. App. 109a. Petitioners similarly assert that the Federal Circuit "did not question *the CFC's finding* that the catastrophic flooding of [p]etitioners' properties 'occurred because MRGO caused breaches in the levees.'" Pet. 28 (quoting Pet. App. 22a) (emphasis added). But the court of appeals did not defer to any such purported finding. In the quoted sentence, the court simply described petitioners' "theory" that "the taking occurred because the MRGO caused breaches in the levees." Pet. App. 22a.

In fact, the CFC's actual discussion of causation relied in significant part on documents that addressed the potential for Reach 1 of the MRGO to funnel storm surge into the downtown New Orleans area. See, *e.g.*, Pet. App. 141a-147a. Petitioners' properties, however, are not located in downtown New Orleans, and their theory of causation was not based on Reach 1. Rather, petitioners claimed that St. Bernard polder flooded because MRGO caused LPV levees to breach along *Reach 2*. See pp. 3-4, 8, *supra*. As the court of appeals noted (Pet. App. 6a n.1), the CFC itself quoted from a Senate Report concluding that "the Reach 2 portion of MRGO had little impact on Katrina's storm surge," *id.* at 146a (quoting S. Rep. No. 322, 109th Cong., 2d Sess. 124 (2006)).[5]

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[5] In the court of appeals, petitioners attempted to derive a relevant finding of fact from the CFC's quotations of the testimony of

2. The court of appeals ruled, in the alternative, that petitioners could not premise a takings claim on the government's failure to armor the MRGO against erosion before the 1980s. Pet. App. 9a-13a. The panel opined that although "the theory that the government failed to maintain or modify a government-constructed project may state a tort claim," it does not state a takings claim, which requires that the asserted invasion be "the direct, natural or probable result of authorized government action." *Id.* at 10a.

While petitioners take issue with that alternative ruling (Pet. 21-28), it has no practical consequence in this case in light of petitioners' overarching failure to prove causation. For the reasons already discussed, petitioners' causation theory fails regardless of whether they blame the breaching of the LPV levees on the government's action in designing and constructing the MRGO, or on subsequent inaction, such as a failure to armor the banks of the MRGO before the 1980s or to close the channel to shipping traffic before Hurricane Katrina.

Furthermore, although petitioners now characterize the panel's reasoning as stating a novel "categorical rule" that a takings claim cannot be based on "inaction," Pet. 2, they disavowed any suggestion below that their

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their expert, Dr. George Paul Kemp. But as the government explained (Gov't C.A. Reply & Resp. Br. 10-11), Dr. Kemp is a hydrologist, not a civil engineer, and was thus unqualified to testify as to why LPV levees breached. Nor did Dr. Kemp purport to opine on the reasons for the breaches. 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." Pet. App. 140a-141a. That unremarkable testimony said nothing about why LPV levees breached.

takings claim was premised on omissions. In the court of appeals, petitioners insisted 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." Pet. C.A. Br. 37. Instead, petitioners asserted that their "claim and the CFC's analysis were premised on the entirety of the MRGO project (design, construction, operation, and maintenance)." *Ibid.* They argued that "[o]nce the Government proceeds with such authorized *actions*, it bears the risk of takings liability for their direct, natural, or probable results." *Ibid.* (emphasis added). To the extent that petitioners addressed inaction, they simply stated that the "fact that the Government may have avoided those results, and thus liability, by doing things differently or taking some other action (such as armoring MRGO's banks), does not somehow transform a takings challenge to the actions the Government *did* take into a challenge to 'discretionary inaction.'" *Ibid.*

Consistent with petitioners' position, the court of appeals observed that "the sole affirmative acts involved were the construction of MRGO, which was completed by 1968, and the continued operation of the channel." Pet. App. 14a. And the panel rejected the takings claim because petitioners "failed to establish that the construction or operation of MRGO caused their injury." *Ibid.*

In any event, the court of appeals' statements do not conflict with any decision of this Court or of another court of appeals. Petitioners rely (Pet. 22) on *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799, 800, 812 (1950), but that case did not involve inaction. Instead, the government there flooded the plaintiffs' land by "artificially maintaining the Mississippi River

* * * continuously at ordinary high-water level" in order to facilitate navigation. And in *United States* v. *Dickinson*, 331 U.S. 745, 750-751 (1947), the Court concluded that the government took land that "inevitably washe[d] away as a result of th[e] flooding" caused by the government's construction of a dam. The claims in those cases bear no resemblance to the claim asserted here, which is that the government should have done more to bolster a federal flood-protection system against flood risks. Cf. *Sponenbarger*, 308 U.S. at 265.

Nor are petitioners correct (Pet. 27-28) that the decision below conflicts with decisions of other courts of appeals. In *Lenoir* v. *Porters Creek Watershed District*, 586 F.2d 1081, 1084 (6th Cir. 1978), the plaintiff alleged that the defendant watershed district had breached its contractual promise to maintain channel projects; petitioners do not rely on any purported contractual promise here. In *United States* v. *Chicago, B. & Q. R. Co.*, 82 F.2d 131, 137 (8th Cir.), cert. denied, 298 U.S. 689 (1936), the court of appeals explained that the harm at issue was caused "by building the dam" itself. *Hernandez* v. *City of Lafayette*, 643 F.2d 1188, 1194-1200 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982), simply held that a city did not enjoy absolute immunity from a takings claim based on the effect of a zoning ordinance. Finally, the court of appeals in this case explained that the decision in *Ridge Line, Inc.* v. *United States*, 346 F.3d 1346 (Fed. Cir. 2003), turned on the "government['s] action" in building a facility that increased storm water runoff. Pet. App. 12a. In any event, any inconsistency between the Federal Circuit's decision in

Ridge Line and its decision here would not warrant this Court's review. See p. 10 n.3, *supra*.[6]

3. Although the court of appeals did not reach the issue, see Pet. App. 14a, petitioners' takings claim also fails because the risk that petitioners attributed to the MRGO was not foreseeable at any relevant point in time. See Gov't C.A. Resp. & Reply Br. 28-33. The original design of the MRGO did not provide for armoring the banks of the channel against erosion, see *Robinson II*, 696 F.3d at 450, but that design could not have posed a foreseeable risk to the LPV levees, because the LPV did not exist when the MRGO was designed, see Pet. App. 25a n.14.

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[6] Petitioners' amici cite several state court decisions purportedly finding a taking based on the government's "flood[ing of] private property through *inaction*." Cato Institute et al. Amici Br. 16-17. But the decisions on which amici rely resolve questions of state law and, in most cases, do not involve flooding from natural disasters like hurricanes. See *Litz* v. *Maryland Dep't of Env't*, 131 A.3d 923, 934 (Md. 2016) (reversing dismissal of complaint based on damage from sewage leaking into lake on plaintiff's property and emphasizing that holding was limited to requirements for stating a claim); *Robinson* v. *City of Ashdown*, 783 S.W.2d 53, 54-55 (Ark. 1990) (reversing judgment in favor of city on inverse condemnation claim under Arkansas Constitution based on sewage leaking into home); *Jordan* v. *St. Johns Cnty.*, 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011) (intermediate appellate court decision holding that under state law, "a governmental entity has a duty to reasonably maintain its public roads"); *Arreola* v. *County of Monterey*, 99 Cal. App. 4th 722, 738-744 (2002) (considering question regarding failure of levee based on state takings provision and state water law). Indeed, the holding of one of amici's cases affirmatively supports the court of appeals' decision here. See *Electro-Jet Tool & Mfg. Co.* v. *City of Albuquerque*, 845 P.2d 770, 777 (N.M. 1992) (upholding dismissal of state-law inverse condemnation claim because plaintiff failed to plead an "action" by the city) (citation omitted).

Nor did the CFC find that the MRGO posed a foreseeable risk to the Reach 2 levees in the ensuing decades. The CFC declared that the risk posed by the MRGO should have been foreseeable "by 2004," Pet. App. 176a, and suggested that the Corps should have closed the MRGO to shipping traffic before Hurricane Katrina struck in 2005, *id.* at 177a; see *id.* at 168a-169a (declaring that the taking ended when the Corps closed the MRGO to shipping traffic in 2009). But even if a finding of foreseeability decades after the relevant government action could support takings liability, petitioners declined to defend the CFC's reasoning. See Pet. C.A. Br. 31 (attempting to minimize CFC statement regarding foreseeability in 2004); *id.* at 78 (arguing that "[t]he CFC erred in determining that the temporary taking ended on June 30, 2009, when the Corps closed MRGO").[7]

[7] At the direction of Congress, the Corps closed the MRGO channel to shipping traffic in 2009 because shoaling from Hurricane Katrina made the MRGO unnavigable for deep-draft shipping, and restoring the channel to pre-Katrina navigational use was not economically justified. See C.A. App. 75,864, 75,867.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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