**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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| IN RE DOWNSTREAM ADDICKS AND BARKER (TEXAS) FLOOD-CONTROL RESERVOIRS | ) | Sub-Master Docket No. 17-cv-9002L |
| THIS DOCUMENT RELATES TO:<br><br>ALL DOWNSTREAM CASES | ) | Chief Judge Susan G. Braden |

**UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

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## INTRODUCTION

Hurricane Harvey was an extraordinary 1000-year storm for which the federal government has expended billions via Congressionally-appropriated hurricane relief.[1] Plaintiffs do not contend that any government actions could have extended flood protection to all citizens of the Greater Houston area. This means that Harvey's floodwaters inevitably affected private property and, moreover, that only no-win choices about how to attempt to mitigate private losses were available to the U.S. Army Corps of Engineers (the "Corps"). This is far from the situation where a "classic taking" arises.

The United States did not release water onto private property for a public purpose such as power generation, irrigation, navigation, water supply, or recreation, as was the situation in the cases Plaintiffs rely on, but instead addressed an emergency where so much rain fell that the flooding of private property was inevitable. It was Hurricane Harvey—not the United States—that set in motion the events that caused the flooding about which Plaintiffs complain. Plaintiffs cannot state a taking claim by alleging that the Corps should have retained greater volumes of water (potentially affecting different property owners) or not released it downstream when it did, which at bottom is all Plaintiffs contend in this action. Nor are Plaintiffs entitled to Fifth Amendment compensation for damages they believe could have been avoided had the Corps operated the dams differently during Hurricane Harvey, because such a claim would be a classic tort allegation of negligence for which this Court lacks jurisdiction. And not surprisingly,

[1] [1] Plaintiffs do not dispute the information in our opening brief about the aid the United States has provided to Plaintiffs and others in Texas who were impacted by Hurricane Harvey. *See* USA's Mot. to Dismiss 2-3, ECF No. 48. Since January, the Small Business Administration has approved and funded more aid.

Plaintiffs identify no final judicial decision in which the United States has been held responsible under the Fifth Amendment for damages from a hurricane or similar Act of God.

Plaintiffs attempt, unsuccessfully, to re-characterize legal defenses that bar their claims. But there can be no question that the government action at the crux of this dispute is the Corps' attempt to limit the damage to private property from Harvey's floodwaters. Actions of such character are a classic exercise of police power and imbue no liability under longstanding Supreme Court precedent. *See*, *e.g.*, *Miller v. Schoene*, 276 U.S. 272 (1928).

Nor can the Court properly find a taking simply because federal projects were unable to cope with the full volume of floodwaters resulting from Hurricane Harvey's unprecedented rainfall. Plaintiffs have no protected property interest under either Texas or federal law in keeping their properties free from floodwater releases consistent with longstanding storm-release procedures at the Addicks and Barker dams. Indeed, the police power and the Flood Control Act of 1928 provide inherent constraints on Plaintiffs' real property rights and establish the background principle that the United States does not take on the role of insurer merely by engaging in flood control activity. To conclude otherwise would be to endow Plaintiffs with a property right to perfect flood control and to oblige the federal government to serve as guarantor of that right. No court has recognized the former, and Congress has expressly disclaimed the latter.

Plaintiffs' attempts to dissuade the Court from considering that they cannot state a claim for relief under the Fifth Amendment even if the facts alleged in the Complaint are proven are not well-supported, and the Court should address squarely that issue now. Plaintiffs attempt to distract from the elements in *Ridge Line*, upheld in numerous cases since, by addressing fact-specific considerations that may bear on the ultimate questions of liability, as discussed in

*Arkansas Game & Fish v. United States*, 568 U.S. 23 (2012).[2] At the motion to dismiss stage, these fact-intensive determinations do not come into play. Rather, at the pleadings stage, Plaintiffs must allege as a threshold matter (1) that they possessed a protected property interest, (2) that the flood at issue was the direct, natural, or probable result of Government action, and (3) that the flooding was "substantial and frequent enough to rise to the level of a taking." *Ridge Line, Inc.*, 346 F.3d at 1357 (citation omitted). While *Arkansas Game & Fish* clarified that claims alleging Government-induced, recurring flooding are not automatically exempt from takings analysis, 568 U.S. at 38, it did not relieve claimants from the requirement to plausibly allege these threshold elements from *Ridge Line*, which Plaintiffs have failed to do. Rather, here, Plaintiffs allege only one instance of flooding during the 70-year life of the Addicks and Barker projects, which itself occurred during an unprecedented, 1000-year storm event. Plaintiffs have therefore failed to state a claim.

[2] Although Plaintiffs attempt to litigate in this motion to dismiss many of the factors the Court must ultimately consider with respect to liability, the United States has raised only those that the Court can and should decide at this juncture of the case without the benefit of any factual findings. The United States has therefore not asked the Court to consider in the context of this motion to dismiss many of the factual questions relevant to liability that the Supreme Court articulated in *Arkansas Game & Fish*. The Court should decline Plaintiffs' invitation to engage in premature fact-finding. Furthermore, though the United States disagrees with many of the assertions of fact Plaintiffs set forth in their response brief, none of those facts are pertinent to the resolution of the instant motion. The United States disputes many of the alleged facts and characterizations, including but not limited to Plaintiffs' assertions about the Corps' operations and obligations generally and during the storm. The United States does not detail every dispute it has with Plaintiffs' factual assertions because the content of these Sections is unnecessary to the resolution of this motion.

## ARGUMENT

### I. Efforts to Ameliorate Flooding and Damage To Private Property During a Hurricane Emergency Do Not Constitute A Taking.

#### A. The United States' Motion to Dismiss Is Not Premised On a Common-Law "Necessity" Defense, But On the Absence of a Takings Claim.

Plaintiffs base their claims squarely on the Corps' operation of the Addicks and Barker dams during the emergency presented by Hurricane Harvey, but complaints about those operations cannot form the basis of a takings claim. That is because "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *United States v. Cress*, 243 U.S. 316, 328 (1917). The dams' operation during the hurricane, and the heroic work of Corps employees in the midst of the storm, were focused on protecting lives and, secondarily, private property. This is a core governmental police power, and courts have rightly held that governments are not liable for damages that occur when they act to prevent even greater damage, particularly damage to the very same properties. Plaintiffs cite no authority for why the police power should not apply and rely on cases describing takings in far different scenarios from that presented by the emergency flood control the Corps provided during the hurricane—an unprecedented scenario for which no appellate court has found a taking.

The Texas Supreme Court has defined the exercise of police power as "a grant of authority from the people to their government agents for the protection of the health, the safety, the comfort and the welfare of the public. In its nature it is broad and comprehensive." *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921). Furthermore, it is clear that the exercise of police powers resulting in mere diminution of property value does not constitute a taking, particularly when the damage is common or public. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413-

14 (1922), *abrogation recognized on other grounds by Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764 (9th Cir. 2000). Whatever the outer dimensions of the police power, the protection of life or property by government during an emergency are plainly at its heart. *See, e.g.*, *Miller v. Schoene*, 276 U.S. 272 (1928) (diseased plants); *TrinCo. Inv. Co. v. United States*, 722 F.3d 1375 (Fed. Cir. 2013) (a forest fire), *on remand*, 130 Fed. Cl. 592 (2017); *Nat'l Bd. of YMCA v. United States*, 395 U.S. 85 (1969) (a rioting mob); *Bowditch v. City of Boston*, 101 U.S. 16 (1879) (an urban conflagration); *Bachmann v. United States*, 134 Fed. Cl. 694 (2017) (criminal mischief).

The disconnect in Plaintiffs' opposition is highlighted by their efforts to characterize the unique nature of the Addicks and Barker dams as that of typical public works that permanently impound water upstream, and the Corps' actions as having imposed known flooding on their specific properties. Those characterizations are neither accurate nor consistent with the allegations in the Complaint. In arguing that the government is "of course" liable and "must compensate" Plaintiffs for their damages, Plaintiffs offer a partial quotation from *Harris County Flood Control District v. Kerr*, 499 S.W.3d 793, 807 (Tex. 2016). Pls.'s Opp'n to US Mot. to Dismiss 31, ECF No. 72 ("Pls.' Br."). The complete quote, with the words redacted from Plaintiffs' brief in italics, is as follows:

> This is not a case where the government made a conscious decision to subject particular properties to inundation so that other properties would be spared, as happens when a government builds a flood-control dam knowing that certain properties will be flooded *by the resulting reservoir*. In such cases of course the government must compensate the owners who lose their land *to the reservoir*.

*Kerr*, 499 S.W.3d at 807.

The type of reservoir described in *Kerr* is not created by the flood-control dams at issue here, where land behind the dams is typically dry, notwithstanding Plaintiffs' repeated erroneous

reference to the Addicks and Barker dams as "Reservoirs."[3] The Addicks and Barker dams do not alter or control the flow of Buffalo Bayou except during times of excessive rainfall and runoff and do not capture or redirect a permanent watercourse. The cases cited by Plaintiffs that find a taking in the context of permanent reservoirs are inapposite. *See Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166 (1871) (finding a taking where a dam built on the Fox River to allow for the construction of a mill resulted in raising the level of Lake Winnebago and overflowing 640 acres of private property); *United States v. Dickinson*, 331 U.S. 745, 751 (1947) (finding a taking where construction of Winfield Lock and Dam raised the pool level of the Kanawha River to improve navigation, but also inundated portion of land and caused erosion over additional acreage).

Plaintiffs assert that their property was "taken" by a singular governmental action—"the Corps' release of floodwaters" by opening the floodgates of the Addicks and Barker dams on the morning of August 28, 2017. Pls.' Br. 22. But Plaintiffs do not allege that the government intended to invade *their* property, which is the relevant inquiry on a taking claim. Rather, as Plaintiffs allege, faced with two bad options, the Corps decided to open the floodgates—the the best option available under the circumstances. Pls.' Am. Compl. ¶ 64, ECF No. 23. To dress its allegations in takings nomenclature, Plaintiffs allege that the Corps' action appropriated a benefit to the government at the expense of property owners, but ignore that the dams retained the water to benefit their properties. Accepting as true Plaintiffs' allegations, they describe the actions of a governmental entity exercising its police powers to protect life, property and commerce. When

[3] Addicks and Barker are not "reservoirs" in the common definition of that term. Merriam-Webster, https://www.merriam-webster.com/dictionary/reservoirs (last visited Apr. 11, 2018) ("a place where something is kept in store: such as (a) an artificial lake where water is collected and kept in quantity for use."). In contrast, Addicks and Barker do not store or alter the flow of Buffalo Bayou except temporarily when its flow increases due to heavy rains and runoff.

the government exercises its police powers, it cannot be held liable for a taking even if property is damaged or destroyed as a result of the exercise of those powers. *Nat'l Bd. of YMCA*, 395 U.S. at 92-93.

Plaintiffs seek to recast the United States' argument as invoking the doctrine of necessity. But that is a distinct doctrine, which the United States did not assert as the basis for its motion to dismiss. Plaintiffs offer no authority establishing (or even suggesting) that jurisprudence rejecting taking liability where the government exercises core police powers is in fact the same as the common law necessity defense, and the Court cannot simply disregard binding authority establishing that no taking exists on the facts pled. *Cf. Miller*, 276 U.S. 272; *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5-6 (1949) (noting, in a physical taking case, that a "loss due to an exercise of the police power is properly treated as part of the burden of common citizenship" (citation omitted)); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 509-10 (1923); *Bowles v. Willingham*, 321 U.S. 503, 518 (1944); *Bachmann*, 134 Fed. Cl. at 696. Under this police power jurisprudence, the plaintiffs bear the burden of proof. *B & F Trawlers, Inc. v. United States*, 27 Fed. Cl. 299, 305 (1992) (noting that "an exercise of the police power by the Government is presumed to be reasonable and that the party challenging the government action bears the burden of demonstrating that it is unreasonable" (citation omitted)). If Plaintiffs' allegations would not, if proven, establish a taking, then the complaint should be dismissed.

B. Even If the United States' Motion Presents a Common-Law "Necessity" Defense, Dismissal is Appropriate Under Rule 12(b)(6).

The crux of Plaintiffs' opposition is to characterize the United States' police power argument as synonymous with a "necessity defense," and to claim that a defense cannot be considered by the Court in a motion to dismiss. However, even assuming *arguendo* that the police power basis for the government's action must be viewed as an affirmative "necessity

defense," the Court should still consider the defense and dismiss the complaint. A complaint "can be dismissed on a Rule 12(b)(6) motion when its allegations indicate the existence of an affirmative defense that will bar the award of any remedy." *Corrigan v. United States*, 82 Fed. Cl. 301, 304 (2008) (internal quotations and citations omitted).

The case relied on by Plaintiffs addresses the general topic of what affirmative defenses are and when they can be resolved on a motion to dismiss, but otherwise is not similar to the present case. In *Silver Buckle Mines, Inc. v. United States*, 117 Fed. Cl. 786 (2014), the corporate plaintiff sought to recover maintenance fees that it had paid to the Bureau of Land Management on seventy-two mining claims during a two-year period in which the law appeared to no longer require payment of such fees. One of the defenses raised by the United States was that the payment was voluntary. The Court denied the government's motion to dismiss because it found the "voluntary payment" defense was an affirmative defense and that additional factual development not present in the complaint would be needed to consider it. *Id.* at 797 (citing 5B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357).

A more closely-related case is *TrinCo. Investment Co.*, in which the Court denied the government's motion to dismiss because it found that the necessity defense was an affirmative defense and that the allegations of the complaint did "not demonstrate that the [forest] fire had created an imminent danger and an actual emergency necessitating the burning of [plaintiff's] timbered acreage." 722 F.3d at 1380. Here, in contrast, Plaintiffs cannot deny that Hurricane Harvey created an imminent danger and an actual emergency. The floodgates were opened as part of the ongoing emergency the metropolitan area faced. The allegations of the Amended Complaint themselves demonstrate that, faced with "water pools in the reservoirs [rising] faster than expected, the Corps was left with two options." Pls.' Am. Compl., ¶ 64. Both options

would result in the flooding of properties, but only the option taken by the Corps reduced the risk of a catastrophic and "uncontrolled" release. *Id.*

Plaintiffs seek to broadly characterize the government's argument as applicable to any government action intended to "protect the general public" that "would render the Takings Clause a nullity." Pls.' Br. 29. That is not the government's argument. On the contrary, actual emergencies that necessitate the destruction of property are unusual, but there are a variety of factual scenarios in which they occur. *See Nat'l Bd. of YMCA v. United States*, 395 U.S. 85 (1969) (rioting mob that destroyed building in the Canal Zone); *United States v. Caltex*, 344 U.S. 149 (1952) (destruction of oil facilities in Manila during World War II when a Japanese advance was imminent); *Bowditch v. City of Boston*, 101 U.S. 16 (1879) (destruction of building during urban conflagration); *Bachmann v. United States*, 134 Fed. Cl. 694 (2017) (damage to house to capture criminal fugitive). While each of these present factually unique exigent circumstances, they all constitute a necessary exercise of the government's police powers. The actions taken by the Corps during Hurricane Harvey, as alleged in the Amended Complaint, are no less an exercise of police powers during "uncontrollable emergency circumstances" taken to avoid imminent danger; in such situations, courts have found the government not liable for a compensable taking.

## II. Plaintiffs Identify No Authority Recognizing the Property Interests They Claim.

### A. State Law Defines What Property Rights Are Protected By Law.

Although federal law defines whether a property right has been taken, the Court must look to state or common law principles of property to determine whether a particular protected right exists at all. Plaintiffs confuse the United States' argument. The United States does not, as Plaintiffs suggest, seek to supplant federal takings jurisprudence with that from the state. Rather,

the United States asks the Court to consider state law to determine whether Plaintiffs have any property right to prevent extreme rainfall from a record-breaking hurricane from releasing excess floodwater onto their land—floodwaters that they allege a pre-existing landowner (the United States) could not contain on its own land. If Plaintiffs have no right to keep such floodwaters off their property, they cannot show that any protected property right was taken, even if their allegations are proven. Plaintiffs identify no cases or statute recognizing such a right, and Texas law has never recognized such a right, so their claims here must fail.

Plaintiffs must establish first that they have a property right to prevent floodwaters from occupying their properties. Whether a property right exists is a threshold question. *Wyatt v. United States*, 271 F.3d 1090, 1097 (Fed. Cir. 2001); *Conti v. United States*, 291 F.3d 1334, 1341-42 (Fed. Cir. 2002) (finding a license to fish was not a protectable property interest, but a boat was). To determine whether such a right exists, the Court can look to state or federal common law because the Constitution does not create property rights. *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1352-53 (Fed. Cir. 2003) (considering first whether the plaintiff had a "protected property interest" in barges before considering whether the interest was taken); *Acceptance Ins. Cos. v. United States*, 583 F.3d 849 (Fed. Cir. 2009).

Indeed, the case Plaintiffs themselves cite, Pls.' Br. 14, acknowledges the relevance of state law. *See, e.g., Pumpelly*, 80 U.S. at 178 (sustaining support for taking from Wisconsin law interpreting property rights). Contrary to Plaintiffs' unsupported assertion (Pls.' Br. 14) that background principles only matter as to regulatory takings, the scope and dimensions of Plaintiffs' "bundle of sticks" are relevant to all takings. Background principles of property law have no less relevance in instances of physical takings, particularly where, as here, Plaintiffs have alleged the taking of an intangible right, such as a flowage easement. *See, e.g.*, *United*

*States v. Willow River Power Co.*, 324 U.S. 499, 504 (1945) (describing, in a physical taking case, the appurtenant property interest asserted as a right to unobstructed water flows and noting that the damage may pass to the United States only if the interest "is a legally protected one."). Plaintiffs rely on cases and circumstances that are inapposite either because property rights were not challenged, or because the property interest allegedly taken was not one appurtenant to ownership as alleged here, but instead the entire property. Plaintiffs here do not allege that the United States seized ownership or now possesses their property, as was as the case in *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015) (describing the government seizure of raisin crops). Indeed, the United States has not seized Plaintiffs' real or personal property. So cases such as *Horne* that require a plaintiff to establish only ownership of property are inapplicable.[4] More applicable here are instances where a plaintiff alleges a taking of a right incident to property ownership, as was the case in *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005). There, because the claimant alleged a taking of a property right—navigable airspace—incident to property ownership, the court first had to consider whether the plaintiff possessed such a right. *Id.* at 1217-18 (finding no such right existed under the circumstances claimed).

The Supreme Court's jurisprudence in cases alleging a taking of property rights appurtenant to the land—as opposed to the land itself—clearly establishes that a plaintiff must prove the property interest exists in the first place. *See e.g.*, *Willow River Power Co.*, 324 U.S. 499. *See also Mildenberger v. United States*, 643 F.3d 938, 948 (Fed. Cir. 2011) (finding that state recognized no property rights in the riparian interests asserted). This preliminary

[4] The United States did not challenge whether the plaintiff had a property right in the raisins, and the Supreme Court did not address the issue in its opinion. *Id.*

examination of property rights is particularly important when a landowner claims an interest that is limited by law by the property interests of other landowners. *See e.g. United States v. Twin City Power Co.*, 350 U.S. 222, 225-28 (1956) (limiting riparian rights because of the government's dominant navigational servitude).

B. Plaintiffs Have No Property Interest In Preventing The Intrusion of Floodwaters The United States Could Not Contain.

"Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them." *Willow River*, 324 U.S. at 510. Property law has long recognized that individual property rights are often limited and defined based on the property rights of other landowners. As a simple example, a landowner who purchases property subsequent to an upstream landowner may not be entitled to withdraw as much drinking water as she would have had her acquisition predated that of the upstream landowner. Easements can similarly be superior or inferior. Plaintiffs would have the Court ignore these long-standing tenets of property law and instead treat their properties as if they exist in a vacuum. Plaintiffs' position is not supported by law.

Plaintiffs' property rights are necessarily bounded by pre-existing rights of the United States and other landowners. Texas law recognizes that property rights incident to the ownership of land (such as those pertaining to waters thereon) are determined by the law in effect at the time title is transferred, and subsequent changes in the law do not affect those rights that have already vested. *Manry v. Robison*, 56 S.W.2d 438 (Tex. 1932). So too, as both federal and state authorities recognize, are Plaintiffs' property rights constrained by the exercise of the police power.[5] *Lombardo v. City of Dallas*, 73 S.W.2d 475, 478-79 (Tex. 1934) (noting that

[5] The police powers have been recognized to constrain property rights in myriad circumstances such as the enactment of zoning regulations, *Lombardo*, 73 S.W.2d 475, and the limitations on

"compensation is not required to be made for such loss as is occasioned by the proper exercise of the police power."). Because of these background principles that define and constrain property rights, the Plaintiffs here have no more right to prevent, or receive compensation for, waters released that exceeded the United States' storage capacity than they would be to stop the intrusion, or receive compensation, when the police intrude into their homes in pursuit of a criminal fugitive. *See* discussion *supra* Section I.

Plaintiffs do not allege a cognizable property interest because neither background principles of common law nor those of Texas law recognize a property interest in complete and perfect flood control at any time, and certainly not during an unprecedented storm such as Hurricane Harvey. Plaintiffs allege that, for the first time in the 70 years since the Addicks and Barker dams were created, the United States released floodwaters downstream into Buffalo Bayou, thus causing the bayou to overtop and flood Plaintiffs' property so as to effect a taking. Pls.' Br. 3. Thus, Plaintiffs allege flooding because the United States only partially, but not fully, stopped floodwaters that collected behind the Addicks and Barker dams from flowing downstream into Buffalo Bayou. This takings claim depends entirely on Plaintiffs owning a cognizable property interest in complete and perfect flood control. No Texas court, however, has recognized a property interest in perfect flood control in the face of a severe storm. Nor has a Texas court recognized a property interest in remaining free of incidental and consequential flooding caused by releases from a preexisting dam with a long-established pattern of operation. Because Plaintiffs lack these sticks in their bundle of property rights, they cannot allege a cognizable property interest that was invaded, and their takings claim fails as a matter of law.

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placement of oil and gas wells on private property. *See, e.g., Brown v. Humble Oil & Refining Co.*, 83 S.W.2d 935, 942 (Tex. 1935).

Plaintiffs cite to the Texas Tax Code, which broadly defines property. Pls.' Br. 12. While Texas law may recognize broad categories of property interests, it does not recognize a property owner's absolute right to use real property in any certain way, without restriction. *See City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972) (discussing impositions on property rights from the exercise of the police powers), *declined to follow on other grounds by Bd. of Adjustment of City of San Antonio v. Wende*, 92 S.W.3d 424 (Tex. 2002); *City of La Marque v. Braskey*, 216 S.W.3d 861, 863 (Tex. App. 2007). Texas law protects only vested property interests. *Tex. S. Univ. v. State St. Bank & Tr. Co.*, 212 S.W.3d 893, 903 (Tex. App. 2007). And, the Takings Clause only requires compensation for the taking of a *protected* property interest. Plaintiffs do not address the vast majority of the cases cited in the United States' motion to dismiss showing that Texas does not recognize a property interest akin to that alleged here. In particular, Plaintiffs ignore *Bunch v. Thomas*, 49 S.W.2d 421 (Tex. 1932), where the Supreme Court of Texas considered whether a landowner could maintain a levee constructed on his land, and be free from liability for damages that levee might cause adjacent landowners. The court concluded that because the waters had percolated to the levee based on ditches, artificial water courses and improvements upstream, the pre-existing levee could remain and continue to divert waters onto lands adjacent. *Id.* at 424. Here, Plaintiffs must acknowledge that the Corps restrained water to benefit their property, essentially an allegation that the United States—despite its best efforts—could not fully contain waters within flood-control structures and allowed some of that water (less than the inflow upstream) to flow in its natural course into Buffalo Bayou. Plaintiffs identify no precedent or authority recognizing a right that requires the United States to divert all floodwater, including that which would have flowed naturally onto Plaintiffs' properties in the absence of the United States' acting.

Plaintiffs further argue that Texas cases, which uniformly found no taking under circumstances similar to those here, are irrelevant. *See, e.g.*, *Sabine River Auth. of Tex. v. Hughes*, 92 S.W.3d 640, 642 (Tex. App. 2002) (finding no intentional act of the government from extreme precipitation); *Wickham v. San Jacinto River Auth*., 979 S.W.2d 876, 880-81 (Tex. App. 1998) (describing an allegation of flooding based on a rainfall event exceeding the 100-year frequency) (citing *DuPuy v. City of Waco*, 396 S.W.2d 103, 108-09 (Tex. 1965)). In doing so, Plaintiffs miss the crux of the United States' arguments. The United States does not dispute that federal law governs whether a taking occurred. Nor does the United States contend that, where Texas courts found no taking under the Texas constitution,[6] the federal government should find no Fifth Amendment taking. Rather, the United States cites Texas law to show the scope and extent of Plaintiffs' property interests, which are governed by Texas law. *Maritrans*, 342 F.3d at 1352 ("'[E]xisting rules and understandings' and 'background principles' derived form an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." (citing *Lucas*, 505 U.S. at 1030)).

C. Texas Protects No Property Rights Against Community Invasions.

Plaintiffs allege nothing more than consequential and incidental flooding because they do not claim the dam releases were aimed at inundating their lands. This flooding, where no Plaintiffs were directly targeted, is not a taking, even assuming *arguendo* that it was foreseeable. Texas courts only recognize a right to compensation "if the injury is not one suffered by the

[6] The Texas Constitution provides broader protection of private property in that it mandates "adequate compensation" if a person's property is "taken, damaged, or destroyed." Tex. Const. art. I, § 17(a).

community in general." *Felts v. Harris Cty*., 915 S.W.2d 482, 484 (Tex. 1996) (citing *Gulf, Colo. & Santa Fe Ry. v. Fuller*, 63 Tex. 467, 470-71 (1885)). As with all public works projects, including the Addicks and Barker dams, "it is inevitable that benefits will accrue to the property of some persons and injury will result to that of others." *Aaron v. Port of Houston Auth. of Harris Cty*., No. 01-12-00640-CV, 2013 WL 4779716, at *3 (Tex. App. Sept. 5, 2013) (quoting *Fort Worth Improvement Dist. No. I v. City of Fort Worth*, 158 S.W. 164, 168-69 (Tex. 1913), *superseded by statute on other grounds by Lagrone v. John Robert Powers Schs., Inc.*, 841 S.W.2d 34 (Tex. App. 1992)). "If the injury . . . [is] common with other property in the same community or section, the damages thus accruing are deemed merely consequential, and no right of action exists." *Id*. This aspect of Texas law is particularly applicable here because Texas law does not consider their property "damaged" in the first place. *Id*. Plaintiffs allege that the Addicks and Barker dams are public works projects intended to benefit all downstream property owners, including themselves as property owners downstream of the Reservoirs. Pls.' Am. Compl. ¶ 52. Plaintiffs allege that as part of the normal operation of the dams, the Corps released water from the reservoirs into Buffalo Bayou and flooded their properties. *Id*. ¶¶ 62–66. Under Plaintiffs' theory, and claims of the hundreds of downstream plaintiffs, the alleged occupation was common to all or most of the properties in a given "community or section," and thus "the quintessential notion of community damage." *Felts*, 915 S.W.2d. at 485 (concluding noise pollution was community damage even though it affected different property owners differently). *See also Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 647-48 (Tex. 2004) (no just compensation for light pollution because impact from public works "are compensable only to the extent they are not common to the community . . ." (citation omitted)); *Cernosek Enters., Inc. v. City of Mont Belvieu*, 338 S.W.3d 655, 666 (Tex. App. 2011) (plaintiff

alleging noise pollution failed to demonstrate that "injury affects it in some special or unique way that is different from the injury suffered by the community at large" (citation omitted)); *Wilkinson v. Dallas/Fort Worth Int'l Airport Bd.*, 54 S.W.3d 1, 17 (Tex. App. 2001) (concluding that noise and pollution caused by airport runway was community damage). Plaintiffs do not allege that they were specifically targeted nor do they allege that their damage was peculiar or distinct from that of other community members. *See, e.g.*, Compl. ¶ 78 ("the prolonged flooding of many neighborhood left homes and business under water for extended period of time.") Indeed, Plaintiffs allege that many members of the community suffered indiscriminate flooding and seek certification of a class action. These allegations, taken as true, would only show that any alleged flooding is a collective injury, shared by the community, and thus a consequence of the Corps' operation of Addicks and Barker dams. This is exactly the types of injury to property that Texas courts applying Texas property law have recognized as not compensable. *Aaron*, 2013 WL 4779716, at *6. To the extent that Plaintiffs claim their injury different because some community members were not affected by the Corps' releases into Buffalo Bayou, those differences do not indicate that Plaintiffs suffered a special injury to property. Rather, differences in flooding are inevitable where there is community injury "based on the location of the properties," but the "difference is one of degree and not kind." *Id*. As Plaintiffs allege a community injury and not an injury to a protected property right under Texas law, their takings claims fail as a matter of law.

D. The Flood Control Act Further Restricts Plaintiffs' Property Interests.

Section 3 of the Flood Control Act of 1928, codified at 33 U.S.C. § 702c, informs the background principles of property law that the government, when engaging in flood control projects, is not an insurer to protect against an extreme flood event, such as a 1000-year storm.

*See United States v. Sponenbarger*, 308 U.S. 256, 266 (1939). As noted by the Eighth Circuit discussing Section 702,

> Undoubtedly floods which have traditionally been deemed 'Acts of God' wreak the greatest property destruction of all natural catastrophes and where floods occur after flood control work has been done and relied on the damages are vastly increased. But there is no question of the power and right of Congress to keep the government entirely free from liability when floods occur, notwithstanding the great government works undertaken to minimize them.

*Nat'l Mfg. Co. v. United States*, 210 F.2d 263, 270 (8th Cir. 1954). This language suggests that Congress through Section 702c intended to safeguard the United States from liability for damage in situations like the instant case where floodwaters cause damage after flood control work has been done. Furthermore, the cases communicate to landowners that no compensation is available for flooding based on the government's exercise of its authority to operate flood control works such as the Addicks and Barker dams. Recognizing takings liability for extreme natural disaster-induced flooding would substantially impede the government's willingness to undertake beneficial civil works, ultimately resulting in greater risks for individuals such as these Plaintiffs.

Plaintiffs rely on *Berenholz v. United States* and *Scranton v. Wheeler* for the proposition that Congress cannot take away substantive liability under the just compensation clause, and use that proposition as a ground to argue that the Flood Control Act cannot act as a limiting background principle for Plaintiffs' property rights. Pls.' Br. at 17 (citing *Berenholz v. United States*, 1 Cl. Ct. 620, 628 n.1 (1982), *aff'd*, 723 F.2d 68 (Fed. Cir. 1983) and *Scranton v. Wheeler*, 179 U.S. 141, 153 (1900)). Plaintiffs' point, which is not correct,[7] pertains to

[7] Congress can retract the waiver of sovereign immunity for takings, without extinguishing substantive liability, as an aggrieved party could still seek a private bill from Congress. Indeed, for almost a century before the Tucker Act of 1887, 24 Stat. 505 (codified at 28 U.S.C. § 1491(a)(1)), there was no blanket waiver of sovereign immunity for takings, though one could seek a private bill from Congress to obtain relief. *See, e.g., Langford v. United States*, 101 U.S. 341, 343-44 (1879) ("It is to be regretted that Congress has made no provision by any general

jurisdiction and not to whether a long-standing doctrine can inform background principles of property law. Thus, this attempt by Plaintiffs to undercut the use of the Flood Control Act as a background principle fails.

## III. Plaintiffs Have Not Alleged a Cognizable Government Action That Caused Their Properties to Flood.

### A. The Government Action Is Both the Closing and Opening of Floodgates.

The Court should reject Plaintiffs' attempt to isolate only the opening of the Addicks and Barker gates, and instead consider also that the Corps closed the gates days earlier in an attempt to minimize flooding downstream. Consideration of both of these actions reveals that Plaintiffs' claim is based on a claimed expectation of flood-control protection not recognized by law. It is well established that takings cases may only proceed in the case of affirmative government action, not government inaction. *Nicholson v. United States*, 77 Fed. Cl. 605, 620 (2007). In order to assess whether Plaintiffs have alleged facts sufficient to show causation, this Court must determine the appropriate "no action" baseline against which the allegedly causative government action is judged, and must also evaluate what is truly the government action at issue. The Supreme Court, the Federal Circuit, and the Court of Federal Claims have all rebuffed efforts to

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law for ascertaining and paying this just compensation"). Before then, plaintiffs whose property had allegedly been taken by the federal government could pursue monetary relief from Congress through private bills. *Id.* at 343; *see also Library of Congress v. Shaw*, 478 U.S. 310, 316 n.3 (1986), *superseded by statute on other grounds by Landgraft v. USI Film Prods.*, 511 U.S. 244 (1994). Congress may decline to waive the sovereign immunity of the United States altogether, or may withdraw consent to suit that was previously given, even if the underlying claim may be one of constitutional dimension. *See Lynch v. United States*, 292 U.S. 571, 581 (1934), *overruling recognized on other grounds by Pro-Eco, Inc. v. Bd. of Comm'rs of Jay Cty.*, 57 F.3d 505 (7th Cir. 1995); *see also Maricopa Cty. v. Valley Nat'l Bank of Phoenix*, 318 U.S. 357, 362 (1943) ("[T]he power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations." (citation omitted)).

artificially subdivide an integrated government action for purposes of takings analysis. The courts have been consistent in resisting such efforts, whether made by plaintiffs or by governmental defendants. As described in the United States' motion, the courts have forestalled takings plaintiffs' attempts to "cherry-pick" elements of an integrated action that displeased them from the elements that benefited them. *See* USA's Mot. to Dismiss 23 (citing *Cary v. United States*, 552 F.3d 1373, 1377 n.* (Fed. Cir. 2009)). The courts have been similarly unsympathetic when they have found the United States to have sliced a government action too finely. *See, e.g., Arkansas Game & Fish Comm'n*, 568 U.S. at 28-29 (finding that even though the Corps' "decision to deviate from the Manual was made independently in each year and . . . the amount of deviation varied over the span of years," it was appropriate to look at the "cumulative effect" of this series of decisions as the appropriate unit of analysis for the takings claim).

The Corps' management of the Addicks and Barker dams to control the exigent threat of Harvey's floodwaters from August 25 through 30, 2017, provides a far clearer case of an integrated government action than the water management decisions at issue in *Arkansas Game & Fish*. In *Arkansas Game & Fish*, the government action at issue was a series of deviations from a published plan, carried out over a period of years. *Id*. Here, it would be inappropriate to isolate the single moment at which the Corps opened the floodgates. The Corps could not have opened the floodgates in response to Harvey floodwaters unless it had previously closed them. Plaintiffs allege no deviation from the Corps' established and expected protocols, as published in its operational plans. Plaintiffs cannot meaningfully isolate the hour-by-hour decision making of the Corps within its overall response to Harvey flood threat that included reducing flood risk on Plaintiffs' properties. To do so would be effectively to claim that the Corps should have managed the specifics of the disaster response differently—an argument founded in negligence,

not in taking jurisprudence. There is no "but-for" world in which the government would have taken the action of opening the floodgates without having previously closed them in the course of responding to the same imminent danger; Plaintiffs' own allegations acknowledge that the Corps could not have opened the gates had it not closed them two days earlier. Pls.' Am. Compl. ¶ 59.

Because Plaintiffs must prove the United States' actions collectively increased the amount of water on their properties in order to prove causation, they cannot meet this basic element to state a claim. Plaintiffs have made no argument that they would not have flooded had the Corps done nothing in response to Hurricane Harvey. They have not alleged facts sufficient for this Court to find that the Plaintiffs' properties would not have otherwise flooded throughout the rains of Hurricane Harvey and the floods in its immediate aftermath.

B. Plaintiffs' Identification of the Property Interests Allegedly Taken is Legally Deficient.

Plaintiffs' failure to adequately describe the personal property allegedly taken from each individual plaintiff, as well as Plaintiffs' pursuit of non-compensable consequential damages, are grounds for dismissal of those claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding that plaintiff must plead "enough facts to state a claim to relief that is plausible on its face"). In response to the United States' argument that Plaintiffs have failed to adequately specify the personal property of each Plaintiff, Plaintiffs argue that "detailing every sofa and TV taken in the flooding serves no legitimate purpose at this stage of the litigation." Pls.' Br. 13 n.3. However, details, such as whether all personal property on the first floor of a house—or only personal property in two rooms on the first floor of a house—were allegedly taken, impacts the United States' development of its defenses, such as analyzing the scope of inundation of

Plaintiffs' real property. Plaintiffs' failure to meet this basic pleading requirement is grounds for dismissal of those claims not articulated in their amended complaint.

## IV. Plaintiffs Have Not Alleged a "Substantial and Frequent" Interference with their Rights.

### A. *Arkansas Game & Fish* Did Not Displace *Ridge Line*.

Plaintiffs are incorrect in asserting that the Federal Circuit's controlling precedent in *Ridge Line* no longer applies, because the Supreme Court's decision in *Arkansas Game & Fish* was narrow. *See* Pls.' Br. 25. As the Supreme Court itself explained: "We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." *Arkansas Game & Fish*, 568 U.S. at 38. To be sure, *Arkansas Game & Fish* identified some factors to be considered as part of the overall balancing test employed in evaluating taking liability for government-induced recurring flooding. *See id.* at 39. It did not, however, alter the underlying substantive elements or factors that inform consideration of takings claims. Had the *Arkansas Game & Fish* court wished to overrule *Ridge Line*, it surely could have done so. *Arkansas Game & Fish*, 568 U.S. at 36.

Put simply, then, nothing in *Arkansas Game & Fish* alters *Ridge Line's* threshold requirement that Plaintiffs allege facts sufficient to support a claim that flooding is or will necessarily be "frequent." *Ridge Line*, 346 F.3d at 1357. As the Federal Circuit described it, "[t]he second prong of the taking-tort inquiry in this case requires the court to consider whether the government's interference with any property rights of Ridge Line was substantial and frequent enough to rise to the level of a taking." *Id*. (citation omitted). This requirement is stated in the conjunctive—meaning both elements of substantiality and frequency must be plausibly alleged and proven to state a claim. The Supreme Court cited *Ridge Line* with

approval, *Arkansas Game & Fish*, 568 U.S.at 39 (citing the *Ridge Line*, 346 F.3d at 1355-56 element regarding intent or foreseeability), and also approvingly quoted the Supreme Court case *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30 (1922) for the proposition that "[w]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking]." *Arkansas Game & Fish*, 568 U.S. at 39. As described below, Plaintiffs cannot meet this threshold requirement.

B. Plaintiffs Have Not Met Their Burden to Allege That Flooding of Their Properties Has Been or Will Be "Frequent".

As described in more detail in the United States' principal brief, the Plaintiffs have not alleged that flooding of their properties has been frequent, recurrent, or even likely to recur in the future. USA's Mot. to Dismiss 27-28. The flooding at issue was, according to Plaintiffs' allegations, the only time in which Addicks and Barker releases were connected to flooding of Plaintiffs' properties in the entire 70-year history of those flood-control management systems. Plaintiffs do not contest the United States' assertion that this sole instance of flooding occurred during a 1000-year storm. Accordingly, their claim should be dismissed for failure to meet the "substantial and frequent" element of the *Ridge Line* test. Plaintiffs' conclusory allegation that "future flooding will be more likely in areas not previously subject to flooding," Pls.' Am. Compl. ¶ 88, ignores both the actual flooding history of their properties and the flood history of the area before the United States made improvements to make flooding less frequent, and lacks any basis in fact. More important here, the vague suggestion of potential future flooding in the future does not satisfy the pleadings standards of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Twombly* or the substantive standards of *Ridge Line*.

## CONCLUSION

For these reasons, and the reasons given in the United States' motion to dismiss, the United States respectfully requests that the Court dismiss this action for lack of jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted.

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Respectfully submitted,

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