IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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In re DOWNSTREAM ADDICKS AND BARKER (TEXAS) FLOOD-CONTROL RESERVOIRS	
THIS DOCUMENT APPLIES TO: ALL DOWNSTREAM CASES	Sub-Master Docket No. 17-9002L Chief Judge Susan Braden

PLAINTIFFS' OPPOSITION TO THE GOVERNMENT'S MOTION TO DISMISS

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INTRODUCTION

Plaintiffs seek just compensation from the United States pursuant to the Fifth Amendment's guarantee: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "The Takings Clause 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 Comm'n v. United States*, 568 U.S. 23, 31 (2012) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). "'[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.'" *Id.* (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)).

In this case, the Government intentionally released water from the Addicks and Barker Reservoirs because it perceived a public purpose in protecting its own landholdings and the property of other owners further downstream. Those intentional acts constitute a "taking" under the Constitution because the Government deprived Plaintiffs of the use and enjoyment of their property either permanently or temporarily (depending on the severity of the flooding).

The Government's various arguments in its motion amount to factual assertions about its affirmative defenses that are not appropriate at the motion to dismiss stage. Its contention that necessity required the releases of water, for example, raises factual issues best addressed after discovery. The Government's "relative benefits" argument is also premature, because it raises factual matters not suited to resolution at the pleadings stage. In addition, the Government's "relative benefits" argument does not apply to this case at all, because it is tantamount to an argument that Plaintiffs cannot recover for the Government's intentional releases without challenging the entire flood-control system. Because the Government's arguments are either premature or faulty, the Court should deny the motion to dismiss.

FACTUAL BACKGROUND

The Buffalo Bayou originates in Katy Prairie and "then continues toward downtown Houston." Consolidated and Amended Downstream Master Complaint ("Compl.") ¶ 54. The Addicks and Barker Reservoirs ("the Reservoirs") were constructed in the 1940s to address the issue of flooding along the Buffalo Bayou. *See id.* ¶ 56. By 2009, the Reservoirs had been rated as among the Nation's most unsafe dams. *See id.* The Reservoirs "are intended to provide flood control downstream along Buffalo Bayou and through the center of Houston to the Houston Ship Channel." *Id*. The U.S. Army Corps of Engineers ("the Corps") operates the Reservoirs and controls their floodgates. *See id*. ¶ 57.

On August 25, 2017, Hurricane Harvey made landfall on the Texas Gulf Coast as a Category 4 hurricane. *See id*. ¶ 59. Over the next four days, approximately 50 inches of rain fell on Houston. *See id*. ¶ 60. Given the unsafe condition of the Reservoirs, the Corps knew — or at least should have known — that a hurricane or tropical storm with heavy rainfall would require a release of water from the Reservoirs on a massive scale. *See id*. ¶ 56. That is precisely what happened. At approximately 8 p.m. on August 25, the Corps closed the Reservoirs' floodgates to impound the rising storm water. *See id*. ¶ 59. As water levels rose within the Reservoirs, the Corps utilized an auxiliary spillway to divert water north of the Addicks Reservoir. *See id*. ¶ 62. But that measure proved insufficient. On August 27, at approximately 12:30 p.m., the Corps announced that, on the following day, it likely would release "intermittent amounts of water from the Reservoirs to reduce the risk of flooding to the Houston metropolitan area." *Id*. ¶ 63.

Because water pools in the Reservoirs rose faster than expected, the Corps was left with a choice: release water from the dams or risk exceeding the reservoir system's capacity and flooding other communities. *See id*. ¶ 64. In particular, it was the Corps' belief that releasing the water from the dams would "protect downtown Houston and other communities in the city, the Houston

Ship Channel, and the integrity of the . . . Reservoirs and associated infrastructure." *Id.* ¶ 82. The Corps acted on that belief in making judgments about which property interests to protect. Very late on August 27, the Corps announced that it was "starting water releases immediately." *Id.* ¶ 64. The Corps planned to release water starting at a combined rate of 1,600 cubic feet per second ("CFS") and increasing to 8,000 CFS. Because Buffalo Bayou was already at flood stage, the massive amount of water the Corps released inevitably flooded roads, private homes, schools, and businesses. *See id.* ¶ 65.

Within hours of the Corps' opening the floodgates, the releases directly affected areas around Buffalo Bayou, raising water levels two feet or more in less than a day and directly causing new or substantial additional flooding for thousands of homes and businesses, including Plaintiffs' homes and businesses. *See id.* ¶ 66. Those living in the affected areas had little warning: water reached the first homes within hours of the August 27 releases. Moreover, many homes and businesses were without power when the Corps announced its decision and did not — and could not — receive the Corps' warning. *See id.* ¶ 68. Because the Corps acted in the middle of the night, and because of the rapid progression of the rising water, many living near Buffalo Bayou woke up to flood waters circling and invading their homes and businesses. Due to the abrupt nature of the Corps' decision, they were largely unable to mitigate the damage to their real and personal property from the Corps' intentional flooding. They did not have time to pack up or salvage any belongings. Some had to be rescued by boat, bringing nothing with them but the clothes on their backs. *See id.* ¶ 69. A mandatory evacuation for the area was issued later that same day. *See id.* ¶ 67.

The Corps knew what would happen. Beginning on August 28, the Corps could see that its releases were already causing flooding of downstream properties and could have no doubt that

its continued releases would cause more flooding. *See id.* ¶ 70. On its Twitter page on August 28, for example, the Corps belatedly warned nearby home and business owners that the "[c]ontrolled releases may cause moderate flooding." *Id.* Nevertheless, the Corps not only continued the releases, but also increased the rate of the water flow out of the reservoirs. *See id*. On or about August 29, the Corps ran various flood models projecting which neighborhoods and which properties would be flooded by rainfall and increased releases from the Reservoirs. *See id*. ¶ 71. And, on August 29, the Corps announced it had decided to make "increased controlled releases" from the Reservoirs in order to "maintain control" of the Reservoirs and ameliorate "unacceptable risk to the spillways." *Id.* ¶ 75. The Corps increased its controlled releases to "full discharge," at the combined rate of 13,000 cubic feet per second or more. *Id*.

As of August 29, the Corps was "monitoring the impact of the stormwater releases." *Id.* ¶ 76. Although the "additional releases ha[d] added to the out-of-banks flooding in neighborhoods along Buffalo Bayou," the Corps determined that releases at varying levels would likely "continue" for "several months" until the Reservoirs were empty. *Id.* On September 1, the Corps announced that it expected "current reservoir discharge rates [to] continue for the next 10-15 days." *Id*. ¶ 77. At a press conference that day, the Corps also communicated that it would likely continue its "[h]igher-than-normal controlled releases . . . through the second week of September" and acknowledged that "homes already affected by the release rates would continue to experience the current water level for an extended amount of time." *Id*.

Plaintiffs are among the victims of the Corps' decision to release water from the Reservoirs. The Representative Class Plaintiffs and Bellwether Individual Plaintiffs are real property owners that suffered destructive flooding starting on or about late on August 27 or early on August 28 due to the Corps' decision to release the water from the Reservoirs. *Id*. ¶ 5. Plaintiffs come from a

wide array of circumstances. Some own residential properties, others businesses. *Compare id.* ¶¶ 6-12, 14-30, 32-37, *with id.* ¶¶ 13, 31, 38-39. Some owners do not live within a floodplain, *see id*. ¶¶ 6-7, 15, 18-21, 23, 26-27, 29, 31, 35-38, 40, 42-43; some live within the 500-year floodplain, *see id.* ¶¶ 8-13, 16-17, 22, 24-25, 28, 30, 32-34, 39, 41, 44-46; whereas still others live within the 100-year floodplain, *see id*. ¶¶ 14, 28. Some owners had previously experienced minimal flooding before Hurricane Harvey, *see id.* ¶¶ 6, 9, 34, 43, whereas others had never experienced any flooding at all, *see id.* ¶¶ 7-8, 10-19, 21-33, 35-42, 44-46. Moreover, some owners experienced varying degrees of flooding due to Hurricane Harvey before the release from the Reservoirs, *see id*. ¶¶ 8-9, 26, 28, 44, while others' homes and businesses were dry before the Corps acted, *see id*. ¶¶ 6-7, 10-25, 27, 29-43, 45-46. Plaintiffs' properties remained flooded through different dates, ranging from August 29 through the third week of September. *See id.* ¶¶ 6-46. And some owners bring their claims as representative class plaintiffs, *see id.* ¶¶ 6-31, whereas others pursue their claims as individuals, *see id*. ¶¶ 32-46.

Plaintiffs, however, share common elements that form the basis of this dispute. They all purchased their property before Hurricane Harvey struck. *See id.* ¶¶ 6-46. Plaintiffs all experienced massive flooding (or a substantial increase in flooding) that would not have occurred absent the Corps' decision to release water from the Reservoirs to protect other Houstonians at Plaintiffs' expense. *See id.* Plaintiffs all had property inundated, destroyed, substantially damaged, and/or devalued as a direct result of the Government's intentional action. *See id*. And none were able to mitigate their damages because of the Corps' failure adequately to warn them that the Government had decided to sacrifice their homes to protect other residential and commercial interests in downtown Houston and the Houston Ship Channel. *See id*. ¶¶ 67-69. Indeed, Plaintiffs "did not have time to pack up or salvage any belongings." *Id*. ¶ 69. Some had

to be rescued. *See id.* Ultimately, the releases left Plaintiffs' "homes and businesses under water for extended periods of time, compounding the damage and damaging some properties beyond repair or remediation." *Id.* ¶ 78; *see also id.* ¶ 80 ("The water that the Corps released and that inundated Plaintiffs' properties contained sewage. This sewage-infested water covered Plaintiffs' land, structures, and personal property, in many cases leading to unhealthy, dangerous mold growth on Plaintiffs' properties.").

Finally, as devastating as the Corps' August decision to destroy their real and personal property was (and continues to be) for Plaintiffs, the outlook is grim for the future too. The Corps' "modeling, documents, and decisions show that the Corps may flood Plaintiffs' properties again when the Corps decides that conditions warrant it." *Id.* ¶ 86. In other words, because the Reservoirs' "purpose is to release large quantities of water to protect against flooding in downtown Houston, the Houston Ship Channel, and surrounding areas," "[e]ach time an extreme flood event occurs and the Corps opens the reservoirs, Buffalo Bayou and the downstream properties will again be flooded." *Id.* ¶ 117. Worse still, the Corps' decisions have altered the course of the Buffalo Bayou such that future flooding will be more likely in areas not previously subject to flooding, leading to further interference with Plaintiffs' property rights, including their use and enjoyment of personal property. *See id.* ¶ 88.

LEGAL STANDARDS

The Government has moved to dismiss the Complaint for lack of subject matter jurisdiction under RCFC 12(b)(1) and for failure to state a claim under RCFC 12(b)(6). *See* Mot. 9-10. Although the Government seeks to obscure the difference, these grounds for dismissal involve distinct judicial inquiries.

First, the Government argues that the Court lacks subject matter jurisdiction. *See* Mot. 26-33. Contrary to the Government's suggestion, however, the inquiry to determine subject matter

jurisdiction is quite limited at the pleadings stage. Under the Tucker Act, "a plaintiff must identify and plead a[ ] . . . constitutional provision . . . that provides a substantive right to money damages in order for the court to have jurisdiction." *Tommaseo v. United States*, 75 Fed. Cl. 799, 802 (2007) (Braden, J.) (citing *Khan v. United States*, 201 F.3d 1375, 1377 (Fed. Cir. 2000)). Thus, the Court "at the outset shall determine . . . whether the Constitutional provision . . . is one that is money-mandating. If the Court's conclusion is that the Constitutional provision . . . meets the money-mandating test, the court shall declare that it has jurisdiction over the cause, and shall then proceed with the case in the normal course." *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (en banc).

Beyond that, Plaintiffs need only "show that they have a 'nonfrivolous' claim founded upon a Constitutional provision" to avoid dismissal for lack of subject matter jurisdiction at the pleadings stage. *Tommaseo*, 75 Fed. Cl. at 802 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). "'Thus, to the extent [Plaintiffs] have a nonfrivolous takings claim founded upon the Fifth Amendment, jurisdiction under the Tucker Act is proper.'" *Id*. at 803 (quoting *Moden v. United States*, 404 F.3d 1335, 1341 (Fed. Cir. 2005)) (alteration in original). To make this showing, the complaint must only allege, for example: "This is a claim seeking compensation from the United States for the taking of private property for public use pursuant to Amendment V of the U.S. Constitution." *Id*. at 802-03. Permitting a more intrusive inquiry at the pleadings stage "would seriously undermine Congress's decision to vest the Court of Federal Claims with exclusive jurisdiction over claims against the United States seeking money damages exceeding $10,000 and founded on the Constitution or a federal statute" as it would require a district court to wade into the merits of the claim before transferring the case to the court Congress "specially

created" to adjudicate such disputes. *Jan's Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1309 (Fed. Cir. 2008).

The Government argues (at 26-33) that subject matter jurisdiction is lacking because the flooding of Plaintiffs' property does not constitute a taking under *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003). But, even assuming that this argument bears on the Court's Tucker Act jurisdiction (as opposed to whether Plaintiffs have stated a claim under the Takings Clause), it is not cognizable at the pleadings stage. Because the *Ridge Line* inquiry "is fact based, . . . it is conducted after discovery, either on a motion for summary judgment or following trial." *Tommaseo*, 75 Fed. Cl. at 804 (citing, among other cases, *Moden*, 404 F.3d at 1341-45). The Government is correct that, "with respect to subject matter jurisdiction, a court does not need to presume the truthfulness of the plaintiff's allegations," and "the court may consider matters outside of the plaintiff's complaint in assessing its jurisdiction, without converting the motion into one for summary judgment." Mot. 9. At the pleadings stage, however, the latitude to venture beyond the complaint extends only to whether the case belongs in this Court — an issue not in dispute here. *See infra* pp. 9-11. Contrary to the Government's suggestion, that latitude does not extend to whether Plaintiffs have a winning takings claim.

Second, the Government argues that Plaintiffs have failed to state a claim. *See* Mot. 10-26. Under Rule 12(b)(6), Plaintiffs need only submit "a short and plain statement of the claim showing that the pleader is entitled to relief. Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (alteration in original). Unlike a challenge to subject matter jurisdiction, a Rule 12(b)(6) motion is generally limited to the four corners of the complaint. "In reviewing the sufficiency of a complaint under Rule 12(b)(6)," in other words, the

Court "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in [Plaintiffs'] favor." *Harris v. United States*, 868 F.3d 1376, 1379 (Fed. Cir. 2017) (per curiam).

In particular, the complaint need only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Nalco Co. v. Chem-Mod, LLC*, – F.3d –, 2018 WL 1055851, at *5 (Fed. Cir. Feb. 27, 2018); *see also Anderson v. Kimberly-Clark Corp.*, 570 F. App'x 927, 931 (Fed. Cir. 2014) (per curiam) ("This 'plausibility requirement' requires the allegations in the complaint to be enough to raise a right to relief above the speculative level."); *St. Bernard Parish Gov't v. United States*, 88 Fed. Cl. 528, 556 (2009) (Braden, J.) (explaining that "factual allegations are examined to determine if they plausibly suggest an entitlement to relief"). "Determining whether a complaint states a plausible claim for relief," in the end, is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

ARGUMENT

I. THIS COURT HAS JURISDICTION TO ADJUDICATE CLAIMS IN PLAINTIFFS' MASTER COMPLAINT

The Tucker Act confers jurisdiction on the United States Court of Federal Claims to render judgment and money damages for any claims against the United States founded upon the United States Constitution. *See* 28 U.S.C. § 1491(a)(1). It also waives the Government's sovereign immunity for those claims. *See United States v. Mitchell*, 463 U.S. 206, 216 (1983). Because the Tucker Act does not itself create a cause of action, to come within the court's jurisdiction a plaintiff must invoke a separate source of substantive law that provides a right to money damages. *See Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc). The Takings Clause of the Fifth Amendment is one such "money-mandating" source of law. *Moden v. United States*, 404 F.3d 1335, 1341 (Fed. Cir. 2005). The standard is clear: jurisdiction is proper so long as Plaintiffs

have made a nonfrivolous allegation of a taking that is not "so insubstantial" as to call into doubt the existence of a federal controversy. *Id.* at 1340-42; *see also Jan's Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1308-09 & n.9 (Fed. Cir. 2008) (explaining that a plaintiff need only bring "a nonfrivolous allegation that it is within the class of plaintiffs entitled to recover under the money-mandating source of law").

Here, Plaintiffs have raised a claim under the Takings Clause that more than satisfies that standard. Plaintiffs have alleged that, "[b]y releasing waters from the Addicks and Barker Reservoirs, and inundating, destroying, damaging, and/or devaluing Plaintiffs' property, Defendant took Plaintiffs' property without just compensation in violation of the Takings Clause of the Fifth Amendment to the Constitution of the United States." Compl. ¶ 4; *see also id.* ¶¶ 101-123 (detailing takings claim). "The government neither argues that [Plaintiffs'] claim is frivolous nor argues that it is so insubstantial . . . as not to involve a federal controversy." *Moden*, 404 F.3d at 1341. Therefore, "jurisdiction under the Tucker Act is proper." *Id.*; *see also Tommaseo v. United States*, 75 Fed. Cl. 799, 802-03 (2007) (Braden, J.) (applying the same standard).[1]

Citing *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003), the Government argues (at 30-33) that this Court lacks jurisdiction because the relevant government action amounts to a tort, not a taking. As noted above, that argument is misplaced at this stage. Whether the Government has taken an interest in a plaintiff's property is a "situation-specific factual inquir[y]" that goes to the merits. *Arkansas Game & Fish Comm'n v. United States*, 568

[1] Plaintiffs also have standing to assert their claims, as they have alleged the invasion of a legally protected interest (flooding of private property), fairly traceable to the Government's conduct (the Corps' release of water from the Reservoirs), that is redressable by a favorable decision (awarding just compensation), *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), and they owned the property before the Corps flooded it, *see Tommaseo*, 75 Fed. Cl. at 803.

U.S. 23, 32 (2012). Accordingly, consistent with Federal Circuit precedent like *Moden* — which the Government cites approvingly (at 24 n.21) — this Court has recognized that the *Ridge Line* inquiry is properly "conducted after discovery, either on a motion for summary judgment or following trial." *Tommaseo*, 75 Fed. Cl. at 804 (collecting cases). The Government also cites (at 4, 31) *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922), but that case does not require a contrary result. There, the plaintiffs alleged a taking, and the Supreme Court reversed and remanded precisely for the Court of Claims to consider that issue after hearing "the evidence." *Id.* at 330. As this Court explained in *Nicholson v. United States*, 77 Fed. Cl. 605 (2007), which the Government also cites (at 10, 26): "Plaintiffs, having alleged a non-frivolous takings claim, thereby satisfy the requirements of subject-matter jurisdiction under Rule 12(b)(1) of the Court of Federal Claims." 77 Fed. Cl. at 613.[2]

II. PLAINTIFFS HAVE ADEQUATELY PLEADED THAT THE CORPS' ACTIONS CONSTITUTE A TAKING UNDER *ARKANSAS GAME*

In *Arkansas Game*, the Supreme Court established that government-induced "[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." 568 U.S. at 37 (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)); *see also id.* at 32 (emphasizing

[2] In passing, the Government questions (at 20-21 n.18) whether the immunity provision in the Flood Control Act of 1928 ("FCA"), 33 U.S.C. § 702c, withdraws Tucker Act jurisdiction in this case, but declines to affirmatively argue that position. As explained *infra* pp. 17-18, the FCA has no bearing on this case, and, as the Government readily concedes, the Supreme Court and Federal Circuit have held under analogous circumstances that the FCA did not impliedly repeal the Tucker Act.

The Supreme Court has held that the Agricultural Marketing Agreement Act of 1937 ("AMAA") withdraws Tucker Act jurisdiction over takings claims brought by raisin handlers "because the AMAA provides a comprehensive remedial scheme." *Horne v. Department of Agric.*, 569 U.S. 513, 526 (2013). But the FCA has no remedial scheme, let alone a comprehensive one. The Government's citation to *Horne* is therefore irrelevant.

that "most takings claims turn on situation-specific factual inquiries"); *accord Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (takings analysis involves "ad hoc, factual inquiries"). Given "the nearly infinite variety of ways in which government actions or regulations can affect property rights," the Court eschewed any "magic formula." *Arkansas Game*, 568 U.S. at 31. Rather, several factors inform whether a government-induced flooding amounts to a taking: (a) the existence of a protectable property interest under state law; (b) the character of the property and the owners' "reasonable investment-backed expectations" regarding the land's use; (c) causation; (d) intent or foreseeability; and (e) the severity of the interference, including the duration of the flooding. *See id.* at 38-39. Taking Plaintiffs' factual allegations as true, as this Court must, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009), each of those factors obtains here.

A. Plaintiffs Possessed a Cognizable Property Interest Under State Law

1. At the time of the taking, Plaintiffs possessed protectable property interests recognized under state law. The Takings Clause protects not only real property but also personal property. *See Horne v. Department of Agric.*, 135 S. Ct. 2419, 2426 (2015) ("The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."). However, "[b]ecause the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998).

The Texas Code, in turn, defines property broadly as "any matter or thing capable of private ownership," real property to include "land" and "improvement[s]," and personal property as "property that is not real property." Tex. Tax Code Ann. § 1.04. Plaintiffs have alleged "legally cognizable property interests in the real and personal property located at their residences, businesses, and other properties located near or downstream from the Addicks and Barker

Reservoirs." Compl. ¶ 103; *see also id.* ¶¶ 6-46. Plaintiffs attached deeds and other evidence of ownership to the Master Complaint. *See* Compl. Exs. 1-40. As alleged in the Complaint, then, Plaintiffs own and have rights in real and personal "property" as defined by Texas state law.[3]

That should be the end of the matter. *See St. Bernard Parish Gov't v. United States*, 121 Fed. Cl. 687, 719 (2015) (finding protectable property interests in "property" as defined by Louisiana law).[4] Instead, the Government argues at length (at 14-22) that "background principles" of law deprive Plaintiffs of their legally cognizable property interests. For example, the Government argues (at 17) that Plaintiffs "must show that the alleged property right has been recognized in circumstances similar to those presented here, a devastating natural disaster." That is not the law. Plaintiffs need merely show that the property rights they assert are recognized by law — Plaintiffs are not required to identify an analogous takings case to prove they have property rights.[5] The Government is thus trying to stack the deck by defining away Plaintiffs' property

[3] The Government also rehashes (at 24-26) its argument that Plaintiffs must "identify the specific personal property of each Plaintiff." The Government ignores that the Court already denied the Government's Motion for a More Definite Statement. *See* ECF No. 32. Plaintiffs have adequately pleaded the specific property *interests* taken. *See*, *e.g.*, Compl. ¶¶ 116-118. That is all RCFC 9(i) requires. Moreover, as Plaintiffs have explained, detailing every sofa and TV taken in the flooding serves no legitimate purpose at this stage of the litigation. Plaintiffs have alleged they own personal property, including "equipment, vehicles, furniture, and personal effects," *id.* ¶ 49, "located on th[eir] real property," *id.* ¶ 112. As the Court recognized, "for jurisdiction" that is "more than sufficient." Feb. 6, 2018 Hr'g Tr. 12:8-12.

[4] The appeal of that case remains pending before the Federal Circuit. Nothing in the Government's challenge here questions this Court's conclusion that the *St. Bernard Parish* plaintiffs had the necessary protectable property rights to establish a taking. *See* Principal Brief for the United States, *St. Bernard Parish Gov't v. United States*, Nos. 16-2301 & 16-2373, Dkt. No. 25 (Fed. Cir. filed Dec. 9, 2016). With respect to the question of protected property interests, the Government challenged only the Court's award of real-estate taxes to the City of New Orleans, a nonparty in the case. *See id.* at 64-67. Plaintiffs here do not include any state or local government, and they do not assert tax payments as a protectable property interest.

[5] Even if Plaintiffs were required to do so, this Court did exactly that in *St. Bernard Parish* — recognizing, in the context of a major storm, the right to be free from Government storage of water on private property without just compensation. *See* 121 Fed. Cl. at 719.

rights. Plaintiffs' property rights are unambiguous. Plaintiffs have the right not to have the Government store water on their property without just compensation. *See Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1872) ("where real estate is actually invaded by superinduced additions of water . . . , so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution"). And Plaintiffs have the right to be paid for any flowage easement the Government takes over their property. *See Ridge Line*, 346 F.3d at 1354 ("[I]f [the Government] wants an easement . . . , it must pay for it.") (ellipsis in original). The Fifth Amendment protects Plaintiffs' rights in relation to their real and personal property. *See United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) ("The constitutional provision is addressed to every sort of interest the citizen may possess.").

2. Nothing in the Government's motion alters those rights. The Government argues (at 16) that Plaintiffs do not have a cognizable property right to keep floodwaters from their properties during an "Act of God." But that misconstrues Plaintiffs' Complaint. Plaintiffs are not claiming they have a right to be free from hurricanes. Rather, they claim the Federal Government cannot deliberately or foreseeably flood their properties for public use without paying just compensation — precisely what the Fifth Amendment guarantees. *See*, *e.g.*, Compl. ¶ 81.

At bottom, the Government's argument here is an overreach. "Background principles" of state law do not shape property rights so as to insulate the Federal Government from flood takings claims. True, property rights are created by the State and remain subject to the reasonable exercise of state authority, such as abating a nuisance. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-30 (1992). But that unremarkable proposition is irrelevant here — in a case involving a physical, not a regulatory, taking. *See Horne*, 135 S. Ct. at 2427 ("Whatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their

property, real or personal, to be actually occupied or taken away.").[6] Moreover, Texas state court decisions in discrete cases do not alter those background principles, which are the province of the legislature. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001) (declining to consider "when a legislative enactment can be deemed a background principle of state law"). While state law can help define property rights, the Texas state court cases the Government cites do not indicate any limit on Plaintiffs' right to be free from the Federal Government storing water on their property for the benefit of others.

In *Benavides v. Gonzales*, 396 S.W.2d 512 (Tex. App. 1965), which the Government cites (at 16), the private defendant's reservoir broke, discharging large amounts of water onto the plaintiff's land, and the court held that unprecedented rainfall was a defense to liability because it

[6] As the Government would have it (at 14), state-law definitions of property rights can amount to a dispositive "threshold matter" in a takings analysis. However, the cases the Government cites on this score (at 14) involve the Federal Circuit's "regulatory takings analysis." *Colvin Cattle Co. v. United States*, 468 F.3d 803, 806 (Fed. Cir. 2006). The Supreme Court has "stressed the 'longstanding distinction' between government acquisitions of property and regulations." *Horne*, 135 S. Ct. at 2427; *see also id.* at 2428 ("It is 'inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.") (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002)).

In the context of a regulatory taking, an alleged taking may be noncompensable where a plaintiff puts his land "to a use that is proscribed by . . . 'existing rules or understandings.' " *Lucas*, 505 U.S. at 1030. But Plaintiffs here are merely asserting their right to use and enjoy their property for ordinary residential and commercial purposes without the Government storing water on their land. These are valid and venerable rights, and — Plaintiffs submit — not controversial ones. *Cf. Colvin Cattle*, 468 F.3d at 806 (determining that water rights do not include attendant right to graze on public land).

In *Arkansas Game*, the Supreme Court suggested that state "water-rights law" is one factor that may bear on a "property owner's distinct investment-backed expectations." 568 U.S. at 38. However, analyzing "the bearing, if any, of [Texas] water-rights law on this case" is properly considered only as one component of Plaintiffs' reasonable, investment-backed expectations regarding the land's use, a necessarily fact-intensive inquiry. *Id.* Such considerations are inappropriate at this stage.

was a superseding cause. 396 S.W.2d at 514. That case does not limit Plaintiffs' right to be free from the Federal Government's *deliberate* release of floodwaters onto their properties, which caused new or substantial additional flooding. The Government also misreads *Ford Motor Co. v. Dallas Power & Light Co.*, 499 F.2d 400 (5th Cir. 1974). There, the Fifth Circuit reversed and remanded for retrial expressly for the jury to consider whether the defendant's release of water was an intentional invasion of the plaintiff's property, as recognized by Texas law.[7] These cases do not strip Plaintiffs of any rights they assert here.

Many of the other Texas cases the Government cites address takings as defined under the Texas Constitution. *See*, *e.g.*, *DuPuy v. City of Waco*, 396 S.W.2d 103, 106-09 (Tex. 1965); *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 105 (Tex. 1961);[8] *Strother v. City of Rockwall*, 358 S.W.3d 462, 467 (Tex. App. 2012); *AN Collision Ctr. of Addison, Inc. v. Town of Addison*, 310 S.W.3d 191, 194-97 (Tex. App. 2010); *Sabine River Auth. of Texas v. Hughes*, 92 S.W.3d 640, 641-42 (Tex. App. 2002); *Wickham v. San Jacinto River Auth.*, 979 S.W.2d 876, 880-84 (Tex. App. 1998). Such decisions are inapposite here. Although state law (along with federal law and common law) informs the scope of property rights, that is a different question than what constitutes a taking. *See Bartz v. United States*, 633 F.2d 571, 577 (Ct. Cl. 1980) (per curiam)

[7] The Government also quotes this opinion out of context. When the court indicated the reservoir operator "did not create the flood," it likely meant that the operator did not cause the rainfall in the first place. *Ford Motor*, 499 F.2d at 413. The court understood that the dam operator could be held liable for its operation of the dam, and it reversed expressly for retrial on that issue. The court's discussion, in dicta, regarding the duty to warn indicates that the court found the dam operator's conduct troubling, not that liability was restricted to that issue.

[8] Contrary to the Government's assertion (at 18), *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474 (Tex. 2014), is neither a flood nor a takings case, but rather involved an action for breach of contract and trespass. In any event, the Texas Supreme Court's discussion there of the proper measure of damages for injury to real property has no relevance on a motion to dismiss.

(while "the meaning of 'property' as used by the Fifth Amendment will normally obtain its content by reference to state law," "the issue of what constitutes a 'taking' is a 'federal question' governed entirely by federal law"). Texas is entitled to its own view of takings under the Texas Constitution as it relates to the state government's actions.[9] But such views have no bearing on what constitutes a taking under federal law with regard to the actions of the Federal Government. To permit States to modify federal law in such a way would not only undermine well-established preemption jurisprudence, but also open the door for States to expand their residents' access to the federal fisc through passage of highly permissive takings laws.

The Government also invokes the FCA, 33 U.S.C. § 702c, but the FCA likewise has no bearing on this case. The Government incorrectly suggests that the FCA is "a withdrawal of consent to be sued" (at 21) and "acts as a bar to liability" (at 22). Where, as here, Plaintiffs advance constitutional claims, the FCA does not apply. *See Nicholson*, 77 Fed. Cl. at 608 ("This immunity provision is inapplicable to the present dispute because the Plaintiffs' claims are based on the U.S. Constitution, not on the statutes providing for the Corps flood control or hurricane protection."); *Berenholz v. United States*, 1 Cl. Ct. 620, 628 n.1 (1982) ("[S]ince this case involves a taking, the question of § 702c immunity does not arise."), *aff'd*, 723 F.2d 68 (Fed. Cir. 1983) (table). Nor could Congress legislate away the Just Compensation Clause. *See Turner v. United States*, 17 Cl. Ct. 832, 834-35 (1989) ("Defendant's contention that 33 U.S.C. § 702c renders the United States immune from any Fifth Amendment taking claim arising from federal flood control projects is without merit."), *rev'd on other grounds*, 901 F.2d 1093 (Fed. Cir. 1990); *see also Scranton v.*

[9] To the extent this Court is interested in Texas's jurisprudence on the State's own takings provision, such consideration should be limited to the definition of property interests applied in the takings context. On that score, the Texas Supreme Court has construed property broadly to include "not only the thing owned, but also every right which accompanies ownership and is its incident." *Gulf, C. & S.F. Ry. Co. v. Fuller*, 63 Tex. 467, 469 (1885).

Wheeler, 179 U.S. 141, 153 (1900) ("[O]f course in its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use.").

Moreover, as the Government readily concedes (at 20-21 n.18), the FCA does not withdraw relief for takings available through the Tucker Act. *See California v. United States*, 271 F.3d 1377, 1381-83 (Fed. Cir. 2001) (FCA did not impliedly repeal the Tucker Act for claims involving contracts related to flood-control projects); *cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018-19 (1984) (federal statute did not impliedly repeal the Tucker Act for constitutional takings claims). To adopt the Government's position regarding the FCA would mean no plaintiff could bring an inverse-condemnation takings claim based on government-induced flooding. But following the enactment of the FCA in 1928, the Supreme Court has repeatedly held otherwise. *See*, *e.g.*, *Arkansas Game*, 568 U.S. at 27 (holding that government-induced temporary flooding can give rise to a taking); *United States v. Dickinson*, 331 U.S. 745, 746-50 (1947) (sustaining inverse-condemnation flood takings claim).

B. Plaintiffs Had Reasonable, Investment-Backed Expectations in Their Property Remaining Free from Government-Induced Flooding

Plaintiffs had reasonable, investment-backed expectations that their property would not be flooded by deliberate government action. A property owner's reasonable, investment-backed expectations necessarily involve knowledge of any prior flooding. However, even when a property "lies in a floodplain below a dam, and had experienced flooding in the past," a takings claim may prevail where the prior flooding is not "comparable" to the flooding giving rise to the claim. *Arkansas Game*, 568 U.S. at 39.

Here, Plaintiffs "could not have anticipated the Corps' decision or its dire impact." Compl. ¶ 83. Plaintiffs own homes and businesses "in residential neighborhoods and commercial areas

near and along Buffalo Bayou" where they have lived and worked for many years. *Id.* ¶ 49. Since it was developed decades ago, the area had suffered no government-induced flooding. When purchasing their properties, Plaintiffs had no reason to believe this would not remain the case. Awareness of, and reliance on, existing conditions are the cornerstones of the investment-backed-expectation inquiry.

Plaintiffs were aware of no such impediment to the land, nor does anything in the Complaint suggest they should have been. While some of Plaintiffs' properties are located in known floodplains, many are not. *See id.* ¶ 83; *see also*, *e.g.*, *id.* ¶ 14 (identifying the Godejords' property as within the 100-year floodplain); *id*. ¶ 22 (identifying the Miltons' property as within the 500-year floodplain); *id.* ¶ 6 (identifying the Aldreds' property as outside of any known floodplain). "Many of Plaintiffs' properties had never flooded before the Corps' releases from the Addicks and Barker Reservoirs, and others had never flooded until they sustained insubstantial flooding from Hurricane Harvey before the Corps' releases inundated their properties; still others who had sustained some flooding in storms prior to Hurricane Harvey had never suffered flooding of the magnitude and duration as they did after the reservoir releases." *Id.* ¶ 83. For those Plaintiffs whose properties are in a "floodplain below a dam, and had experienced flooding in the past," because that prior flooding was not "comparable" to the flooding from the releases, those Plaintiffs also have a viable takings claim. *Arkansas Game*, 568 U.S. at 39.

More important for the instant inquiry, however, are Plaintiffs' pre-Harvey expectations regarding the Corps' operation of the Reservoirs. Plaintiffs' reasonable, investment-backed expectations in the use of their property properly incorporate the existence and known function of

the Reservoirs that predate Plaintiffs' acquisition of the land.[10] The facts that, after the Reservoirs were built, the properties at issue had not flooded and that the Corps had restricted water flows downstream considerably would have been important for Plaintiffs in assessing the value of their properties. The predictable operation of the Reservoirs and the manner in which the Corps had historically released water expanded what Plaintiffs could reasonably expect regarding the enjoyment of their land vis-à-vis risk of flooding, in the same way that a known limitation on usage can circumscribe a property purchaser's reasonable expectations.[11] Where, as here, pre-existing government structures and their operation were necessarily priced into the cost of the property when Plaintiffs acquired it, Plaintiffs had reasonable, investment-backed expectations that their property would remain free of inundation as a result of the Corps' impoundment and rapid release of large quantities of water.[12]

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[10] This is one reason that the Government's reliance on the relative-benefits test, discussed more fully *infra* pp. 35-37, is inapposite here. The relative-benefits test described by *United States v. Sponenbarger*, 308 U.S. 256 (1939), was intended to prevent the windfall that would accrue to a property owner when the Government built a project that "confer[red] great benefit" but also "inflict[ed] slight damage" on that same property. *Id.* at 266-67. In that circumstance, where the government project enhanced the value of the owner's property, it is only equitable that any cost to him from that same project should be balanced against that benefit. This is because, in part, that net change describes any deviation from his investment-backed expectations about the property's value. Here, Plaintiffs purchased their property long after the construction of the Reservoirs. To the extent the Reservoirs conferred additional value, that value accrued to *prior* owners. When purchasing their property, the cost — their reasonable investment in the property — reflected the value of the reservoirs' existence and their historical operation. To apply the relative-benefits test to these individuals would be to undermine their reasonable, investment-backed expectations in their property.

[11] The same is of course true for flood-prevention structures. If the Corps had engaged in regular releases of water at 13,000 CFS prior to Plaintiffs' purchase of the property, the Government could plausibly argue that such releases should have been factored into Plaintiffs' expectations. This result, however, mandates that the converse must be true — that the absence of such operation must also be considered when evaluating Plaintiffs' reasonable, investment-backed expectations.

[12] In its extensive discussion of state law, the Government also argues (at 18) that Plaintiffs can never claim a taking based on the operation of a pre-existing dam. The Government provides

C. The Corps' Actions Caused Plaintiffs' Properties To Flood

The Corps' release of water from the Reservoirs caused the taking of Plaintiffs' property. In any takings analysis, a plaintiff must establish a causal link between the invasion and the authorized government action — that is, that the alleged injury would not have occurred but for the government's action. *See Moden*, 404 F.3d at 1343.

Here, Plaintiffs have adequately pleaded that the Government caused new or substantial additional flooding to Plaintiffs' property. Plaintiffs pleaded that their homes and businesses were dry, or had only insubstantial flooding, before the Corps' releases and as the hurricane was moving away from Houston. *See* Compl. ¶¶ 61, 119. Shortly after the Corps opened the floodgates, Plaintiffs suffered "new or substantial additional flooding." *Id.* ¶ 66. Indeed, the Corps publicly acknowledged that its actions either caused or aggravated flooding in the affected areas. *See id.* ¶¶ 70, 76. Thus, the Government's suggestion (at 24) that Plaintiffs "do not allege that flooding was either more severe or only occurred because of the government action" is plainly false. *See also* Compl. ¶ 119 ("Plaintiffs' and Class Members' properties either would not have flooded, or would have suffered only insubstantial flooding, but for the Corps' decision to release water from the Addicks and Barker Reservoirs.").

The Government argues (at 24) that Plaintiffs failed to plead but-for causation because they "failed to plead facts sufficient to allege an appropriately-defined government action." The

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no authority for that extreme proposition. In fact, *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1961), which the Government cites (at 18), states the opposite: the Texas Constitution ensures that "[a] person's property may be 'taken, damaged or destroyed' and therefore require compensation if an injury results from either the construction of public works *or their subsequent maintenance and operation*." 962 S.W.2d at 504-05 (emphasis added). The other cases the Government cites (at 17-20) for this proposition all involved taking or nuisance claims that accrued before title to the property at issue had transferred to plaintiffs. Here, by contrast, Plaintiffs have pleaded ownership at the time of the taking — the Corps' release of waters from the Reservoirs beginning on August 27, 2017.

Government unpersuasively tries to cast (at 24) the relevant authorized action as "the United States' storm response, which includes both the Corps' closing and opening of the floodgates." Of course, the floodgates would need to be closed before the Corps could release the floodwaters. That does not change the fact that the government action alleged in the Complaint to have caused the taking was the deliberate release of the impounded floodwaters. Plaintiffs thus have alleged a discrete action: the Corps' release of floodwaters. And, contrary to the Government's suggestion, Plaintiffs have " 'pinpoint[ed] what step in the sequence of events . . . constituted conduct that the government could not engage in without paying compensation.' " *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 855 (Fed. Cir. 2009) (quoting *Branch v. United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995)) (ellipsis in original). By suggesting that the challenged government action is instead the United States' *entire* storm response, the Government is attempting to cloak an affirmative defense — public necessity — in the guise of RCFC 12(b)(6). As explained *infra* pp. 28-34, that defense is premature and does not apply to the facts of this case.

The Government's other arguments regarding causation are inappropriate on a motion to dismiss. The Government repeatedly argues (at 3, 13, 27) that the hurricane or "an extraordinary Act of God" caused the flooding, not the Government. Plaintiffs have adduced facts showing otherwise, and at this stage the Court must take those facts as true. *See Iqbal*, 556 U.S. at 678-79. The Government cites *Nicholson*, 77 Fed. Cl. at 618, and *Bartz*, 633 F.2d at 577, apparently to suggest that rain, not the Corps' intentional releases of water from the Reservoirs, caused the flooding of Plaintiffs' properties. Those cases involved dramatically different factual circumstances — *Nicholson* involved failure of a floodwall, 77 Fed. Cl. at 618, and *Bartz* concerned "water linger[ing] on [farms] for longer periods" of time over many years, 633 F.2d at 573. The facts here are different, as they involve the Corps' deliberate release of flood waters

to save other Houston communities at the expense of Plaintiffs' properties. *Id.* at 573. In any event, the courts in both cases had far more developed factual records than here, and they resolved the cases on post-discovery summary judgment motions (*Nicholson*) and a trial record (*Bartz*). Likewise, to the extent the Government argues (at 24) that Plaintiffs' properties would have flooded anyway, that is a question of fact, likely involving expert analysis, and not properly addressed on a motion to dismiss.

D. Flooding of Plaintiffs' Property Was an Intentional or Foreseeable Result of the Corps' Actions

The flooding of Plaintiffs' property was the intended or, at the very least, foreseeable result of the Corps' actions. "[R]elevant to the takings inquiry is the degree to which the invasion is intended *or* is the foreseeable result of authorized government action." *Arkansas Game*, 568 U.S. at 39 (emphasis added); *see also Moden*, 404 F.3d at 1342 (finding a compensable taking where government intends to invade protected property interest, or where such invasion is the "direct, natural, or probable result of an authorized activity").

Late on August 27, 2017, the Corps began releasing water from the Reservoirs with the intention that that water would be stored on Plaintiffs' property, rather than in the Reservoirs. The very purpose of the release was to relieve the Reservoirs from the burden of that water, thereby lowering the risks to communities on the edges of the Reservoirs and to the Corps' structures, including the dams and spillways. *See* Compl. ¶¶ 63-76. Insofar as the Corps made a deliberate decision to store water on Plaintiffs' property, rather than in the Reservoirs, the Corps intentionally flooded Plaintiffs' property.

The flooding of Plaintiffs' property was also, at a minimum, the "direct, natural, or probable result of an authorized activity" by the United States Government. *Moden*, 404 F.3d at 1342. In its motion to dismiss, the Government does not contest that the Corps' actions in releasing

water from the Reservoirs were authorized. Nor can there be any real dispute that the flooding of Plaintiffs' property was not the probable result of the Corps' decision. Indeed, the Corps knew it would cause downstream flooding and warned people in the affected area accordingly. *See* Compl. ¶ 70. As it planned an increase in the release rates, the Corps modeled the likely impact of its releases and could see that their planned course would inundate Plaintiffs' property with two or more feet of flooding. *See* Compl. ¶¶ 71-74, App. C. That the Corps' actions would inundate Plaintiffs' property was therefore not only foreseeable, but also foreseen.

E. The Corps' Imposition on Plaintiffs' Property Was Sufficiently Severe To Constitute a Taking

The Corps' release of water from the Reservoirs caused significant, and in some cases devastating, damage to Plaintiffs' property. The Government's interference with Plaintiffs' property rights was severe. *Arkansas Game* established that the severity of the government interference is a factor in any takings analysis. *See* 568 U.S. at 39; *accord Penn Cent.*, 438 U.S. at 124 (recognizing that the economic impact on plaintiffs' property interests are a factor).

Here, the government-induced flooding was undeniably severe and substantial. The properties at issue in this case are a mix of residential properties and businesses. *See* Compl. ¶¶ 6-46. The Corps' release of water from the Reservoirs, at a high rate, over multiple weeks, "deprived [Plaintiffs] of the customary use" of their homes and businesses for a significant period of time. *Arkansas Game*, 568 U.S. at 39; *see also* Compl. ¶ 79 ("Plaintiffs could not access their properties for several weeks and were displaced from their homes and businesses during that time."). The Corps' actions caused flooding that, in many cases, reached several feet, and remained for several weeks. *See id.* ¶¶ 78-79. As a result, many Plaintiffs were unable to return to their homes for an extended period of time, *see id.* ¶ 79, and were "disrupted [from] the ordinary use and enjoyment" of their homes for months while those homes underwent substantial, costly repairs, *Arkansas*

Game, 568 U.S. at 26. Some Plaintiffs remain displaced to this day, and some are still uncertain of when they might be able to return. In addition to the initial damage from the releases, the prolonged nature of the flooding caused "mold growth," and "sewage-infested water" led to further health hazards. *See id.* ¶ 80. Plaintiffs have been, and continue to be, deprived of the ordinary use and enjoyment of their property as a result of the Corps' release of water from the Reservoirs.[13]

Relying on *Ridge Line*, the Government suggests (at 30-33) that, to be substantial, the appropriation must be recurring — arguing, by implication, that one flood does not a taking make. *See Ridge Line*, 346 F.3d at 1357 (under second prong of analysis, government interference must be "substantial and frequent enough to rise to the level of a taking"). In light of *Arkansas Game*, that proposition no longer holds true. Although the Supreme Court cited *Ridge Line* in *Arkansas Game*, it did so only for the proposition that a takings analysis includes an assessment of "the degree to which the invasion is intended or is the foreseeable result of authorized government action." *Arkansas Game*, 568 U.S. at 39 (citing *Ridge Line*, 346 F.3d at 1355-56).

Arkansas Game undermines, and does not endorse, *Ridge Line*'s other propositions. Indeed, the *Arkansas Game* Court explicitly rejected resort to bright-line rules in a takings analysis. *See id.* at 37 (rejecting "blanket exemptions" and "blanket exclusionary rules"). The Government acknowledges (at 30) the bar on such per se rules. By arguing that flooding must be inevitably recurring, however, the Government attempts to resort to a different categorical rule. That is not the law. Consistent with the Supreme Court's instruction, Judge Allegra of this Court has clarified: "Counting floods is not the controlling consideration. The question, rather, is whether defendant

[13] The Government asserts that Plaintiffs can apply for federal aid and disaster relief (at 1-3, 7-8). That is legally irrelevant to the question whether just compensation for real and personal property has been paid. Moreover, the $33,300 in FEMA aid available in individual assistance (at 2-3) pales in comparison to the just compensation Plaintiffs seek for the taking and associated damage to their homes and businesses.

has appropriated an interest for itself in the subject property — and that inquiry requires an examination of multiple factors." *Quebedeaux v. United States*, 112 Fed. Cl. 317, 324 (2013); *see id.* (denying motion to dismiss and emphasizing that "a single flooding event can be evidence of an intent to appropriate an interest in property, that is, a takings"); *cf. Portsmouth Harbor*, 260 U.S. at 329 (explaining that "it well might be that the taking of a right would be complete" if the United States, having mounted heavy artillery "with the admitted intent to fire across the claimants' land at will," then "should fire a single shot").

Even if *Ridge Line*'s requirement that flooding be substantial and recurring still merits consideration, Plaintiffs' pleadings have established precisely that. Plaintiffs have adequately pleaded facts to establish *Ridge Line*'s broader principle regarding substantiality — that the government invasion "appropriate[d] a benefit to the government at the expense of the property owner, or at least preempt[ed] the owner's right to enjoy his property for an extended period." 346 F.3d at 1356. The Corps' release of water from the Reservoirs appropriated a benefit to the Government — it lowered the risk of damage to the dams and spillways for which the Corps is responsible. The Corps even cited risk of damage to the spillways as justification for its decision to increase the rate of release. *See* Compl. ¶ 75. By inundating Plaintiffs' property, the Corps avoided potentially costly damage to structures it owned, a benefit the Government appropriated at Plaintiffs' expense. And, as explained above, flooding prevented Plaintiffs from gaining access to their homes and businesses for weeks, and displaced some for months, thereby preempting their right to enjoy their property for an extended period. As for whether the flooding is recurring, Plaintiffs have pleaded their belief that "the Corps' modeling, documents, and decisions show that the Corps may flood Plaintiffs' properties again when the Corps' decides conditions warrant it." *Id.* ¶ 86. This is all Plaintiffs must establish at the pleading stage, when facts included in the

Complaint must be taken as true. *See Iqbal*, 556 U.S. at 678-79. The Government's apparent insistence (at 29-30) that Plaintiffs prove more at this early stage, before discovery has even begun, is both inappropriate and inconsistent with the law.

F. Plaintiffs' Allegations Are Well-Pleaded

Finally, contrary to the Government's assertions (at 28), Plaintiffs' Master Complaint does not recite "conclusory allegations," but rather provides a detailed factual recitation of the events surrounding the Corps' decision to release the impounded waters it had stored in the Reservoirs, and the catastrophic effects of that decision on Plaintiffs' property. Those facts, as pleaded, go far beyond what is required to make a facially plausible showing of a taking. Plaintiffs need do nothing more at this stage. *See Quebedeaux*, 112 Fed. Cl. at 321-22 (denying motion to dismiss pursuant to RCFC 12(b)(6) and noting that, to plead a government-induced flooding amounts to a taking, "a complaint need only aver facts showing that: (i) the plaintiff had a property interest; (ii) defendant caused some form of appropriation of the property to occur; and (iii) just compensation has not been paid").

The Government's attempt to place a higher burden on Plaintiffs, prior to discovery, is inappropriate. Unlike in *The George Family Trust ex rel. George v. United States*, 91 Fed. Cl. 177, 183 (2009), on which the Government relies (at 28), the Government is not actually *contesting facts* in the Plaintiffs' Complaint. Simply pointing to facts asserted by Plaintiffs and claiming they are unsupported does not reflect the sort of factual dispute Rule 12(b)(1) permits and diverges significantly from the kind of limited factual dispute at issue in *George Family Trust*.[14]

[14] Plaintiffs also object to the Government's inclusion of facts outside the pleadings, for example by attaching exhibits to their motion, and any effort thereby to convert its RCFC 12 motion into one for summary judgment. *See* RCFC 12(d) ("If, on a motion under RCFC 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion

Plaintiffs have adequately pleaded a takings claim under the Fifth Amendment. The Government's motion to dismiss should be denied.

III. THE GOVERNMENT'S AFFIRMATIVE DEFENSES ARE INAPPLICABLE TO PLAINTIFFS' CLAIMS AND CANNOT BE PROPERLY RAISED IN A MOTION TO DISMISS

A. The Common-Law "Necessity" Defense Does Not Defeat Plaintiffs' Claims Because It Is Premature and Inapplicable to the Circumstances of This Case

In attempt to avoid responsibility, the Government erroneously argues (at 14) that its intentional flooding of Plaintiffs' properties cannot constitute a taking because it involved exercising the state's police power "to protect the general public." The Government's seizure or destruction of private property aimed at serving "public needs" is *precisely* the reason why our Constitution has a Takings Clause. *Kelo v. City of New London*, 545 U.S. 469, 482-83 (2005). As the Supreme Court has explained, the "Takings Clause 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*, 568 U.S. at 31 (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)); *see also Members of Peanut Quota Holders Ass'n, Inc. v. United States*, 421 F.3d 1323, 1329-30 (Fed. Cir. 2005) ("a compensable taking has occurred" when private property "has been appropriated by the government *for the benefit of the public*") (emphasis

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must be treated as one for summary judgment under RCFC 56. All parties must be given a reasonable opportunity to present all material that is pertinent to the motion."); *see also Nicholson*, 77 Fed. Cl. at 614-15 (treating government motion to dismiss for failure to state a claim as one for summary judgment and noting that, "[b]y introducing substantive exhibits in its opening brief, the Government proceeded directly to the merits and precipitated a debate on issues such as flood control responsibility, causation and foreseeability"). In this case, given the complexities of hydrology and other issues relevant to, in particular, the Government's affirmative defenses, any push for summary judgment at this early stage, before discovery has even begun, would be inappropriate. Plaintiffs therefore ask this Court to exclude the Government's exhibits and additional facts that do not bear on jurisdiction.

added). Put simply, the Government's "protect the general public" argument would render the Takings Clause a nullity. That is why no court has ever accepted it.

Seeking to find some footing for its argument, the Government invokes (at 11-14) a sort of necessity defense derived from common-law conflagration cases. But the Government's reliance on this doctrine fails for multiple reasons. As an initial matter, the Supreme Court has characterized this sort of emergency "necessity" argument as an affirmative defense in that, if successful, it serves to "absolv[e] the State (or private parties) of liability." *Lucas*, 505 U.S. at 1029 n.16 (citing *Bowditch v. City of Boston*, 101 U.S. 16, 18-19 (1880)). Accordingly, the argument is "not properly raised in a motion to dismiss unless 'the applicability of the defense . . . appear[s] on the face of the [complaint].'" *Silver Buckle Mines, Inc. v. United States*, 117 Fed. Cl. 786, 797 (2014) (quoting 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 708-10 (3d ed. 2004)) (alterations in original).

To evaluate whether the doctrine is applicable (at this stage, on summary judgment, or at trial), it is important to understand that, while they share some characteristics, the common-law emergency-takings defense is not an exact replica of the necessity defense from tort law. It is narrower in scope and applies only when claimants' property, at the time of destruction, faced ongoing or inevitable damage as a result of external emergency circumstances. The defense is rooted chiefly in nineteenth-century conflagration cases, when firefighting technologies were less developed and massive fires would destroy whole swaths of a city in a matter of hours. In such circumstances, the city would prematurely destroy the next building in the blaze's path in an effort to prevent the fire from spreading beyond that point.

If the property owner were later to bring a claim seeking compensation, courts would deem the destruction noncompensable so long as the government established "the fact[ ] that the blowing

up of the house was necessary, as it would have been consumed had it been left standing." *Surocco v. Geary*, 3 Cal. 69, 74 (1853). Such an owner does not deserve compensation under the common law because "[a] house on fire . . . becomes a nuisance, which it is lawful to abate." *Id.* at 73. Moreover, the government's conduct in cases like these does not involve choosing a particular property for destruction; it merely hastens the property's inevitable fate to prevent further harm to the community. *See id.* at 74; *see also Bowditch*, 101 U.S. at 18 (explaining that a private structure may be "plucked down if the next one be on fire" because such destruction is necessary "to prevent the spreading of a fire").[15]

The other emergency-takings cases on which the Government relies confirm the limited scope of this defense. In each case, it was not government decision-making, but rather uncontrollable emergency circumstances that placed the owner's property in harm's way. *See*, *e.g.*, *National Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85, 93 (1969) ("At the time the troops entered, the riot was already well under way, and petitioners' buildings were already under heavy attack."); *Bachmann v. United States*, 134 Fed. Cl. 694, 697 (2017) ("The only reason [the United States Marshals Service] and other law enforcement officials were concerned with plaintiffs' property was because a fugitive was using the house as his hideout. . . .

[15] Notably, *Bowditch*, which the Government cites in support of its defense (at 11), is not even a takings case. That case involved a compensation claim against municipal officers brought under a local ordinance for fire-prevention victims. 101 U.S. at 16-17. And the Supreme Court decided *Bowditch* before it explicitly recognized that the Fourteenth Amendment made the Takings Clause applicable to state and local officers. *See Penn Cent.*, 438 U.S. at 122 (noting that *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 239-41 (1897), and progeny recognized this rule); *see also Lucas*, 505 U.S. at 1028 n.15 ("The practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses — which . . . occasionally included *outright physical appropriation* of land without compensation — were out of accord with *any* plausible interpretation of those provisions.") (alteration in original; citations omitted). Furthermore, the Court's language regarding the necessity-type defense is dicta: the claim was rejected not because of the merits of any affirmative defense, but rather due to the homeowner's failure to establish the necessary statutory elements for relief. *See Bowditch*, 101 U.S. at 22.

Despite its owners' lack of knowledge, the house had become instrumental to criminal activity."). Furthermore, these cases do not involve sacrificing the few for the many. In fact, the challenged government action in those cases was intended to *benefit* the property owners, along with the public, by seeking to protect the claimants' properties from external threats. *See National Bd. of Young Men's Christian Ass'ns*, 395 U.S. at 93 (likening the presence of anti-riot troops on claimants' properties to "the entry by firemen upon burning premises," which "cannot be said to deprive the private owners of any use of the premises"); *Bachmann*, 134 Fed. Cl. at 696-97 (explaining that property damage resulting from "ent[ry] . . . to effectuate an arrest" is not a taking because the owner of the property "benefited" from the removal of the fugitive intruder).

The Government relies (at 13-14) on *Harris County Flood Control District v. Kerr*, 499 S.W.3d 793 (Tex. 2016), *reh'g denied* (Oct. 21, 2016), for the proposition that "no-win scenario" takings are not compensable. But the Texas Supreme Court's holding in that case had nothing to do with the County's "no-win" defense. The court rejected the plaintiffs' claims on the merits because the plaintiffs failed to establish the basic elements of a taking. *Id.* at 805-07. "The only affirmative conduct on which the homeowners rel[ied]" for their government-induced flooding claim was "the [County's] approval of *private* development." *Id.* at 805. Moreover, "the homeowners offered no proof that the County was substantially certain that the homeowners' particular properties would flood if the County approved new housing developments." *Id.* Because the case did not involve "[a] conscious decision to damage certain private property for a public use," the plaintiffs in that case could not establish a taking. *Id.* at 806. The court explained:

> 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 . . . . In such cases *of course the government must compensate the owners* who lose their land . . . .

Id. at 807 (emphasis added). Here, Plaintiffs challenge the Corps' conscious decision to destroy certain homes and businesses so that others could be spared of flooding and to mitigate risks to the government-owned Reservoirs. *See supra* pp. 2-6, 21-27. According to its own authorities, then, the government is "of course" liable and "must compensate" Plaintiffs for their losses. 499 S.W.3d at 807.

The remaining cases the Government cites in support of its necessity defense are largely outdated nuisance-regulation cases, wholly irrelevant to Plaintiffs' claims. For example, *Miller v. Schoene*, 276 U.S. 272 (1928), is not even a takings case. That suit was brought to challenge a state nuisance regulation under the Due Process Clause of the Fourteenth Amendment. *Id.* at 277, 279-80. The regulation prohibited land owners from allowing the growth of a particular tree fungus within a certain distance of apple orchards. Land owners found to be in violation of this regulation would have their illicit trees destroyed. *Id.* at 277-78. In holding that the State's policy decision to protect apple orchards from a destructive tree fungus was a permissible exercise of state legislative power, the Court did not purport to engage in a takings analysis. *Id.* at 279-80. Indeed, crucial to the Court's decision was the fact that the value of apple orchards far exceeded the value of cedar trees to the Commonwealth of Virginia, as reflected in economic numbers and the statute's policy choice. *See id.* at 279. The Court made clear that the case was not "merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other." *Id.* Here, by contrast, no statute prioritizes other communities over Plaintiffs'

properties. Indeed, the Fifth Amendment recognizes the equal right to private property and is designed to prevent shifting the cost of a public choice to others like Plaintiffs.[16]

Plaintiffs' homes and businesses are not nuisances, and their presence downstream from the Reservoirs violates no law.[17] *Cf. Mugler v. Kansas*, 123 U.S. 623, 664 (1887) (rejecting convicted bootleggers' argument that Kansas's prohibition law was a taking). Nor is the Corps' decision to flood Plaintiffs' property akin to a land-use regulation. *Cf. Chicago & Alton R.R. Co. v. Tranbarger*, 238 U.S. 67, 70-71 (1915) (upholding Missouri regulation requiring newly constructed railroads to include suitable crossings and run-off drains). Plaintiffs have not alleged a regulatory taking, but a physical taking by temporary and inevitably recurring intentional flooding. *See supra* Part II. But, even if this were a regulatory-takings claim, the outdated cases on which the Government relies would not control, as the Supreme Court's regulatory-takings jurisprudence has significantly changed throughout the last century. *Compare Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), *with Lucas*, 505 U.S. at 1019.

The common-law necessity cases are likewise inapposite. The Complaint alleges that, but for the Government's affirmative conduct, Plaintiffs' properties would not have suffered the damage they did. Compl. ¶ 119. Thus, unlike the Government's cases, Plaintiffs allege that the

[16] Moreover, the cases the *Miller* Court cited in support of that holding are likewise unrelated to the Takings Clause; they, too, are due-process and equal-protection challenges attacking land-use regulations that curtail nuisance-like behavior, some of which do not even directly involve property rights. *See* 276 U.S. at 279 (citing, e.g., *Bacon v. Walker*, 204 U.S. 311, 315 (1907) (adjudicating the claimant's "right to pasture," because he "does not show that he is the owner of the land upon which his sheep grazed, [so] what rights owners of land may have to attack the statute [the Court] put out of consideration")).

[17] The Government's suggestion (at 6) that "[n]either the Corps nor the federal government authorized or permitted the downstream development nearby to Buffalo Bayou" is irrelevant. Plaintiffs do not need permission from the Federal Government to build in areas zoned for commercial and residential purposes. That the Government did not do so does not somehow relieve it of liability.

flooding they suffered was not an inevitable injury that would have occurred regardless of how the Government chose to act. *See supra* pp. 21-24; *cf. National Bd. of Young Men's Christian Ass'ns*, 395 U.S. at 93; *Bowditch*, 101 U.S. at 18-19; *Bachmann*, 134 Fed. Cl. at 697. Their homes and businesses were not in harm's way to the same extent — and some were not in harm's way at all — until the Government intentionally released the Reservoirs. *See* Compl. ¶¶ 61, 66. These allegations must be taken as true. As a result, the Government's own cases recognize that this is a taking. *See Harris Cty.*, 499 S.W.3d at 806 ("[A] taking occurs when property is 'damaged for public use' in circumstances where 'a governmental entity is aware that its action will necessarily cause physical damage to certain private property.'") (citation omitted); *see also National Bd. of Young Men's Christian Ass'ns*, 395 U.S. at 93 (Plaintiffs can "claim compensation for the increased damage by [external forces] resulting from the [Government's actions]").

In sum, the Government cannot prevail on this affirmative defense in a motion to dismiss. The defense applies only when the destruction of a claimant's property is the inevitable result of an emergency situation. Such facts do not "appear[] on the face" of Plaintiffs' Complaint. *Silver Buckle Mines*, 117 Fed. Cl. at 797. Rather, the Complaint plausibly alleges the exact opposite, *viz.*, that Plaintiffs' homes suffered flooding (or a substantial increase in flooding) only because of the Corps' decision to release the water from the Reservoirs. *See supra* pp. 21-27. Although "the court may consider matters outside of the plaintiff's complaint in assessing its jurisdiction," Mot. 9, this affirmative defense addresses the merits of Plaintiffs' claim — not the Court's jurisdiction. Thus, the Court "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in [Plaintiffs'] favor." *Harris*, 868 F.3d at 1379. In light of this standard, the Government's asserted necessity defense should be disregarded as premature, if not meritless.

B. The "Relative Benefits" Defense Does Not Defeat Plaintiffs' Claims Because It Is Premature and Inapplicable to the Circumstances of This Case

The Government alleges (at 23-24) that it cannot be liable for a taking because the broader flood-control system benefits Plaintiffs. This sort of relative-benefits argument has been recognized by some courts as an affirmative defense against claims challenging flood-control systems as takings. *See*, *e.g.*, *Gasser v. United States*, 14 Cl. Ct. 476, 503 (1988), *withdrawn on other grounds*, 22 Cl. Ct. 165 (1990) (Mem.). To prevail on this defense where it is available, the Government must prove "that the federal project benefitted the property in excess of the injury it caused." *Id.*

As a threshold matter, the relative-benefits defense does not apply to this case. Plaintiffs' Complaint alleges liability not for the Reservoirs themselves, but only for the Corps' decision to induce flooding by releasing waters impounded within the Reservoirs. Citing a footnote in *Cary v. United States*, 552 F.3d 1373 (Fed. Cir. 2009), the Government argues (at 23) that Plaintiffs cannot seek compensation for the releases without challenging the entire flood-control system. But *Cary* imposes no such constraint. Rather, the footnote merely explains that a "'policy' is not one authorized action but a set of intertwined, authorized actions," 552 F.3d at 1377 n.*, and it does so only because there the plaintiffs' complaint alleged that the government's "land management *policies* . . . result[ed] in a taking," *id.* at 1375 (emphasis added). Nothing in the Federal Circuit's opinion implies that a plaintiff cannot limit her complaint to a single governmental action as opposed to challenging a set of policies in the aggregate.

The relative-benefits defense is derived from the Supreme Court's decision in *United States v. Sponenbarger*, 308 U.S. 256 (1939). There, the plaintiff asserted that the newly constructed flood-control system effected a taking of her property due to the incidental occasional flooding it caused. *See id.* at 260. The government, however, proved that the system also "ha[d]

greatly reduced the flood menace to [her] land by improving her protection from floods." *Id.* at 267. Thus, the Court held that "a flood program that does little injury in comparison with far greater benefits conferred" is not a taking compensable under the Fifth Amendment. *Id.*

Unlike in *Sponenbarger*, far from "little injury," Plaintiffs have alleged the Government's action caused "destruction and ruin." Compl. ¶ 61. The doctrine thus does not apply. *See Quebedeaux*, 112 Fed. Cl. at 322-23 ("[T]he *Sponenbarger* doctrine applies only where the government has inflicted only 'slight damage' on the property allegedly taken."). In addition, Plaintiffs' claims do not concern the Reservoir system at large; they challenge only the Government's decision to inundate private property with Reservoir releases. Therefore, the relative-benefits inquiry considers only the benefits conferred on Plaintiffs by the releases themselves. *See Arkansas Game*, 568 U.S. at 29 (noting that the district court's analysis focused on the Corps' "deviations" from established dam operations, which was the subject of the plaintiff's takings claim, without suggesting that the plaintiff's injuries had to be weighed against the benefits from the dam at large). Because the releases conferred nothing but destruction on Plaintiffs, the relative-benefits defense is not available in this case.

Even if it were, because the relative-benefits argument is an affirmative defense, its consideration is premature: "Contrary to defendant's claims, plaintiffs did not need specifically to aver that the harm caused by the flood here exceeded the benefits provided to plaintiffs by the flood control project." *Quebedeaux*, 112 Fed. Cl. at 322; *see also id.* at 321 (rejecting the relative-benefits test "as a matter of pleading practice, as well as substantive takings law"); *Silver Buckle Mines*, 117 Fed. Cl. at 797 (affirmative defenses ordinarily not properly raised in a motion to dismiss). The Complaint is devoid of any factual allegation that could support the Government's contention that Plaintiffs benefit from the Reservoirs' flood-control system. On the contrary, the

Complaint alleges that the Reservoirs exist to "protect against flooding in downtown Houston, the Houston Ship Channel, and surrounding areas." Compl. ¶ 117; *see also id.* ¶ 52. In other words, the Reservoirs serve homeowners and businesses located further downstream near downtown Houston, not Plaintiffs. Moreover, the relative-benefits test is a fact-specific inquiry that requires analyzing the particularized benefits and harms received by a given property. *See Quebedeaux*, 112 Fed. Cl. at 321-22. Thus, even if the Complaint somehow alleged that Plaintiffs benefit from the flood-control system, consideration at this stage is inappropriate: "nothing in plaintiffs' complaint admits that the particularized benefits received by the property owners here exceeded the costs associated with the alleged takings" — catastrophic injuries Plaintiffs suffered due to the Corps' release. *Id.* at 322. "Indeed, given the factually-intensive nature of the *Sponenbarger* doctrine, it is unsurprising that defendant has failed to cite a single case in which this doctrine has been applied in granting a motion to dismiss under RCFC 12(b)(6)." *Id.* at 323. The government's relative-benefits arguments must be disregarded as inapplicable or, at the very least, premature.

CONCLUSION

By flooding their homes and businesses, the Corps sacrificed Plaintiffs' properties for a public purpose. Plaintiffs have adequately pleaded a significant claim founded upon the Takings Clause of the United States Constitution. Accordingly, the Government's motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of March 2018, I electronically transmitted the above and foregoing document to the Clerk of the Court for the United States Court of Federal Claims by using the CM/ECF for filing. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ David C. Frederick