No. 2023-1363

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

EDGAR ABLAN, ET AL.,
Plaintiffs

CHRISTINA BANKER, TODD BANKER,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

Appeal from the United States Court of Federal Claims in No. 1:17-cv-01409-CFL, 1:17-cv-09001-CFL, Senior Judge Charles F. Lettow.

REPLY AND CROSS-APPEAL RESPONSE BRIEF FOR THE UNITED STATES

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(case caption continued on inside cover)

No. 2023-1365

SANDRA ABDOU, ET AL.,
Plaintiffs

ELIZABETH BURNHAM,
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellant

Appeal from the United States Court of Federal Claims in No. 1:17-cv-01786-CFL, 1:17-cv-09001-CFL, Senior Judge Charles F. Lettow.

Nos. 2023-1366, 2023-1412

CHRISTINA MICU, AND ALL OTHERS SIMILARLY SITUATED, SCOTT HOLLAND, CATHERINE POPOVICI, KULWANT SIDHU,
Plaintiffs-Cross-Appellants

ELISIO SOARES, SANDRA GARZA RODRIGUEZ, ERICH SCHROEDER, MARINA AGEYEVA, GLENN PETERS, VIRGINIA HOLCOMB,
Plaintiffs

v.

UNITED STATES,
Defendant-Appellant

Appeals from the United States Court of Federal Claims in No. 1:17-cv-01277-CFL, 1:17-cv-09001-CFL, Senior Judge Charles F. Lettow.

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INTRODUCTION

As the Court of Federal Claims ("CFC") found, Hurricane Harvey was "the largest storm in the recorded history of the United States." This was a freak storm that would not be predicted to recur for 700 to 900 years. It flooded the structures on Plaintiffs' properties for the first and only time in the 70-year history of the Buffalo Bayou and Tributaries Project ("Project"). Supreme Court precedents regard such isolated physical invasions as individual torts or trespasses, not takings. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2078 (2021); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30 (1922). The trial court erred in holding otherwise.

Plaintiffs cannot transform a one-time, isolated trespass into a Fifth Amendment taking of property merely by showing that a trespass was *conceivable*. It does not therefore further Plaintiffs' claim to point out that the Project dams, as constructed, were physically capable of holding back water to a level that resulted in the flooding of Plaintiffs' properties. Nor does the fact that engineers consider extremely unlikely scenarios to evaluate dam safety mean that flooding is the "direct, natural, or probable result" of the Project. Engineers plan for worst-case scenarios to ensure structural integrity and prevent the devastation that would result from dam failure.

Hurricane Harvey presented the U.S. Army Corps of Engineers ("Corps") with a zero-sum dilemma. Water from the storm had to go somewhere. But the sheer volume of stormwater far exceeded the reservoirs' capacity. The Corps thus faced an inevitable tradeoff: if it released greater volumes of water to prevent upstream flooding, greater harm would occur downstream. But if it retained greater volumes of water to protect lives and private property downstream, greater harm would occur *upstream*.

Property owners both upstream (in this appeal) and downstream (in other cases still pending before the CFC) from the Project have sued the United States seeking compensation for the taking of their properties. But the Corps' management of the situation it faced during Harvey is a classic exercise of the police power. The government acted to prevent loss of life and reduce harm to private property. That is not a taking. The fact that Congress immunized the government from liability for tort damages from floodwaters in such a situation supports a conclusion that property owners cannot reasonably expect to obtain compensation by repackaging a tort claim as one for inverse condemnation.

Disregarding that flooding during Harvey affected millions and that operating the Project to protect everyone was impossible, Plaintiffs raise a host of objections to the purported unfairness of the United States' assertion of no liability for damages from flooding on their properties. Clearly, it is regrettable

that anyone was harmed by flooding during Hurricane Harvey. But the damage does not constitute a Fifth Amendment taking of private property by the Corps. The Corps operated the Project to control flooding, its intended purpose, and did so consistently with longstanding guidance. Nor is the Corps' inaction after original acquisition of land and Project construction in the 1940s compensable.

At bottom, the CFC erred in finding that one-time flooding caused by the most severe rainfall event in the Nation's history constituted the appropriation of an easement by the United States. The judgment below should be reversed.

ARGUMENT

I. The CFC erred in holding the United States liable for a taking.

A. The Corps' operation of the Project in response to a singular, catastrophic storm does not constitute a taking.

That Plaintiffs' structures flooded only once in the Project's 70-history, and only in connection with the Corps' operations of the dams during a record-shattering storm, demonstrates the singular, isolated nature of the invasion of their property interests. In common parlance and under governing precedent, such one-time intrusions are better characterized as a trespass than a taking. That remains so despite the severity of the property damage due to the amount of water resulting in flooding. The CFC correctly recognized the extraordinary, "record setting" nature of the storm, yet it concluded that because the Corps had recognized the theoretical possibility that such storms might occur in the region

and built the dam embankments to withstand a large flooding event, it necessarily follows that it was foreseeable that the Corps, as part of operating the Project, intended to acquire a flowage easement to store water in Plaintiffs' properties on that singular occasion (and during any possible similar natural disasters in the future). As explained in the opening brief (pp. 20-45), that conclusion was incorrect.

Plaintiffs respond by asserting that the government categorically appropriated a flowage easement on their property and that even if it did not, Harvey was one of many large storms that may occur in the future, for which the Corps invaded their property interests. Those arguments should be rejected.

1. The one-time flooding of structures on Plaintiffs' properties did not categorically appropriate a flowage easement to the government.

Plaintiffs assert that there was a categorical taking of their property interests because the government appropriated a flowage interest by physically excluding them from their property during a flood caused by the Project. Banker Brief 19-20; Micu Brief 22-27. But Plaintiffs' categorical takings argument, which sidesteps whether their claims sound in tort rather than takings law, should be rejected.

"[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." *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23, 31 (2012) (cleaned up); *see also Cedar Point*, 141 S. Ct. at 2078 ("[A] physical appropriation is a taking ...."). That categorical rule, however, does not transform a one-time or occasional trespass into a taking. Indeed, the Supreme Court in *Cedar Point* distinguished between "[i]solated physical invasions, not undertaken pursuant to a granted right of access," which are "properly assessed as individual torts," and "appropriations of a property right" that amount to takings. *Id.* at 2078; *see also Arkansas Game*, 568 U.S. at 39 ("While a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove a taking" (*quoting Portsmouth Harbor*, 260 U.S. at 329-30)); Opening Brief 22.

Cedar Point reflects longstanding precedent that contemplates flooding-related takings liability, as opposed to trespass liability, specifically for "inevitably recurring overflows." *United States v. Cress*, 243 U.S. 316, 328 (1917) (holding "no difference of kind ... between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows"). The undisputed facts establish that overflow is far from inevitable here. Structures on non-federally owned land upstream of the Project have flooded only this one time in the Project's 70-year history. Appx17. Although flood-pools behind the dams extended beyond government-owned

land one other time before Harvey, the CFC acknowledged that the prior incident "may have been attributable to local stream flooding or other local circumstances rather than conditions in the reservoirs themselves." Appx17 n.12. Thus, Harvey was the first time there was flooding above government-owned land, affecting structures, related to the operation of the dams. A one-time, catastrophic event is by definition insufficiently frequent to be an "inevitably recurring" flood that could effect a taking.

Plaintiffs rely on this Court's decision in *Ideker Farms, Inc. v. United States*, 71 F.4th 964 (Fed. Cir. 2023), which was decided after the government filed its opening brief, as finding a permanent, categorical taking of property due to changes in flooding patterns found to result from the Corps' operation of the Missouri River Mainstem Reservoir System. *See*, *e.g.*, Banker Brief 19-20; Micu Brief 19, 27. The United States' rehearing petition in *Ideker* has not yet been resolved. But in any event, *Ideker* does not affect the result here.

Ideker explained that "permanent intermittent flooding is a physical taking subject to a *per se* rule." 71 F.4th at 980 (citing *Cedar Point*, 141 S. Ct. at 2071, in turn, citing *Cress*, 243 U.S. at 327-28). But this case involves no such flooding. Instead, this case falls within *Ideker*'s recognition that some cases still require "an analysis of whether a permanent taking or a trespass has occurred," and such an inquiry may "overlap in part with the *Arkansas Game* … analysis of

whether a temporary taking or trespass occurred." *Id*. As the Court stated in *Ideker*: "To be clear, we do not alter or amend our trespass-versus-takings jurisprudence …." *Id.* at 981. Thus, Plaintiffs cannot foreclose a conclusion that the one-time flooding that occurred on their property when the Corps operated the Project in response to Harvey's record-setting rainfall is merely a trespass simply by invoking the categorical rule about physical takings. And in resolving whether tort or takings law applies, the factors from *Arkansas Game* and *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003), still guide the inquiry. *See Ideker*, 71 F.4th at 980 ("[C]ourts *must* continue to rely on *Arkansas Game* … and *Ridge Line*" when making "closer calls than this one" (emphasis added)).

Here, the singular, unprecedented nature of the flooding and the Corps' response to that emergency demonstrate that the flooding related to the Corps' operation of the Project in response to Hurricane Harvey was a trespass, not the appropriation of a property right. Opening Brief 22-27. Structures on Plaintiffs' properties flooded in the wake of Harvey for the first time in the 70-year history of the Project. And while the CFC declined to make a finding of when a storm with similar flooding might recur, the only record evidence at the liability trial about recurrence was that such rainfall over four days in the same area could be expected to occur only once every 700 to 900 years. Opening Brief 23 (collecting citations); *see also* Appx53 (discussing government's evidence at valuation trial

that the frequency of similar rainfall over the reservoirs is 1-in-1000 years (citing Appx7521)). The CFC acknowledged that the Corps would use its "atypical" flowage easement "only in the event of a natural disaster." Appx72-73; *see also* Appx88 (court-sanctioned easement text's statement that "[f]uture flooding is not expected to occur regularly or frequently"); Appx1055.

Plaintiffs nevertheless contend that Harvey was not unprecedented, as "several large storms" have occurred in the past, about once every 15-20 years. Banker Brief 21-22. But none of those "large storms" flooded Plaintiffs' structures or caused flooding at any level close to Harvey. No rational fact-finder could minimize Harvey's significance or rarity by equating it to the "large storms" cited by Plaintiffs. The CFC itself found that Harvey was "a record-setting storm," Appx37, indeed, "the largest storm in the recorded history of the United States." Appx18; *see also Pan Am Equities, Inc. v. Lexington Ins. Co.*, 959 F.3d 671, 672 (5th Cir. 2020) ("Hurricane Harvey was the second-costliest natural disaster in U.S. history, ranking just behind Hurricane Katrina," and "the wettest [storm] on record"). And when it directed the government to file "non-standard or atypical" easements in the county property records, the CFC acknowledged that such easements were "atypical" and would be used "only in the event of a natural disaster." Appx51; Appx72-73; Appx88-89 (easement).

Moreover, the Supreme Court in *Cedar Point* and *Arkansas Game* has reiterated that singular events may constitute a trespass rather than a taking. *See supra* (p. 5). Plaintiffs dismiss the Court's statements as "dictum" about government actions that left no "lasting effects" or "severe damage" to the property. Banker Brief 21. But Plaintiffs' purported distinction does not withstand scrutiny—the relevant inquiry is the "[s]everity of the interference" with the property right, not the extent of damage. *Arkansas Game*, 568 U.S. at 39; *see Cress*, 243 U.S. at 328 ("[I]t 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."); *Ridge Line*, 346 F.3d at 1357 (considering "whether the government's interference with any property rights of [a plaintiff] was substantial and frequent enough to rise to the level of a taking").

In arguing that the Court should not hold the Corps' response to Harvey to be a one-time trespass, Plaintiffs improperly rely on this statement in *Arkansas Game*: "We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." 568 U.S. at 38 (quoted in Banker Brief 21). But the Court's rejection of an automatic exemption plainly is not a determination that all government induced flooding regardless of duration necessarily sounds in taking rather than tort. There is no such holding, in *Arkansas Game* or otherwise. *Arkansas Game*

held only that "*recurrent* floodings, even if of finite duration, are not *categorically* exempt from Takings Clause liability." *Id.* at 27 (emphasis added). The rarity of an interference goes to its "[s]everity," *id.* at 39, and the Supreme Court's precedents make clear that rarity is a key factor in distinguishing trespasses from takings, *see* Opening Brief 22.

Furthermore, this Court's precedents reinforce the principle that "[i]solated invasions, such as one or two floodings …, do not make a taking …, but repeated invasions of the same type have often been held to result in an involuntary servitude." *Eyherabide v. United States*, 345 F.2d 565, 569 (Ct. Cl. 1965) (citations omitted), *quoted in Ridge Line*, 346 F.3d at 1357; *see also Cary v. United States*, 552 F.3d 1373, 1381 (Fed. Cir. 2009) (collecting cases distinguishing permanent and intermittent flooding from isolated incidents); *National By-Products, Inc. v. United States*, 405 F.2d 1256, 1273 (Ct. Cl. 1969) ("[O]ne, two or three floodings by themselves do not constitute a taking."); *accord B Amusement Co. v. United States*, 180 F. Supp. 386, 389 (Ct. Cl. 1960) (one flooding); *North Counties Hydro-Electric Co. v. United States*, 70 F. Supp. 900, 903 (Ct. Cl. 1947) (same); *North Counties Hydro-Electric Co. v. United States*, 151 F. Supp. 322, 323 (Ct. Cl. 1957) ("Two floodings … do not constitute a taking.").

Plaintiffs attempt to distinguish those precedents by arguing that under *Stockton v. United States*, 214 Ct. Cl. 506 (1977), a single flood establishes a taking

if the property is upstream of a dam and the flooding occurs below the elevation to which the dam is designed to hold water. Micu Brief 19, 24-25, 27-28, 31, 32, 36. But *Stockton* concerned land "below the contour line of the designed *and intended* pool" created by a dam. 214 Ct. Cl. at 519 (emphasis added). That takings liability was found as to land the defendant there intended to flood does not suggest a *per se* rule that takings liability should flow inexorably from a one-time flood considered in worst-case-scenario planning for the very different type of Project here. Plaintiffs overread the opinion in divining such a rule from language about land "below the contour line to which the dam is designed to impound water." *Id.* at 518-19. In any event, such a rule would not survive *Arkansas Gas* and *Cedar Point*, which reject any *per se* rule in such situations.[1]

Moreover, if read Plaintiffs' way, that statement from *Stockton* was dictum, as it did not fit the facts of that case. About nine years after the dam in *Stockton* was constructed, the record water level was reached and then "approximated" twice more over about a year-and-a-half, and the government agreed that the level would be reached in the future about every eight years. *Id.*

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[1] Such a rule would also have untoward consequences, such as disincentivizing engineers from planning for worst-case scenarios. Opening Brief 29, 50. And not just in flooding scenarios: would takings liability follow, for example, if in designing an airport runway, a government entity considered the remote possibility of plane crashes on land along takeoff and landing routes?

at 519. Thus, tellingly, *Stockton* noted how takings liability would follow from "intermittent but inevitably recurring" flooding, *id.* at 515 (quoting *Cress*, 243 U.S. at 328), rather than a single, one-time trespass. Here, by contrast, flooding of Plaintiffs' properties at Harvey-like levels is an extraordinary event such that the government's "easement" would be used only during natural disasters. Appx73; *see also supra* (p. 8).

Plaintiffs attempt to minimize Harvey's rarity by noting that "several large storms" occurred in the past and that "large storms" regularly occur in the region "about every 15-20 years." Banker Brief 22. But Plaintiffs cannot reasonably dispute that the Corps has never before invoked the procedures it did here in response to the massive influx of water caused by Harvey, or that no comparable storm ever occurred in the Project's watersheds during the dams' 70-year existence. Moreover, Plaintiffs do not dispute that the CFC made no factual findings about the frequency with which a storm of similar magnitude, raising the reservoir-pools to comparable levels, is expected to recur. Nor do Plaintiffs dispute that they failed to present any evidence of such a return frequency at the liability trial, or that the only such record evidence at that stage was the government's estimate that a storm inducing comparable reservoir-pools would not likely recur for hundreds of years.

Plaintiffs cite the government's briefs in prior flooding cases for the proposition that submersion of land upstream of a dam is an archetypal taking. Micu Brief 4-5, 35-36 (citing U.S. Br. at 18-19, *Arkansas Game*, *supra* (No. 11-597); U.S. Br. at 24, 44-45, *St. Bernard Parish Government v. United States*, 887 F.3d 1354 (Fed. Cir. 2018) (No. 16-2301)). But the government's briefs in those cases hypothetically discussed land that is "permanently inundated" by water stored perennially in a reservoir and the "backwaters" that could form when the reservoir levels fluctuate on a recurring basis. The Project here is entirely different in nature and scope—its two reservoirs stand *empty* except during significant storms, and they were empty at Harvey's outset. Water temporarily detained by the dams in response to a record-setting storm that floods Plaintiffs' structures *once* in over 70 years plainly is not the same as land "permanently inundated" by a reservoir, or "backwaters" that inevitably recur due to a reservoir's regular, non-emergency operations.

To be sure, takings of property downstream from a dam may represent "more difficult cases" where issues of causation and relative benefits come into play. Micu Brief 26-27. But that does not make this an "easy" case where a categorical takings analysis applies. In any event, this Court does not yet have before it the pending litigation by claimants owning downstream properties. If the CFC's judgment stands, a future panel could still hold the United States

liable to the downstream claimants. *See Milton v. United States*, 36 F.4th 1154, 1158 (Fed. Cir. 2022) (reversing order dismissing such claims). And it would be absurd to hold the government responsible for paying upstream landowners for detaining too much floodwater from Harvey behind the dams and paying downstream owners for not detaining the floodwater long enough.

In arguing that the Corps is responsible for a taking of Plaintiffs' properties because it built the Project reservoirs to detain water on more land than the government owns, Plaintiffs accuse the government of acting "solely to save itself money." Banker Brief 23. But this accusation ignores that Congress appropriated federal taxpayer-dollars to build the Project for flood-control purposes, which indisputably saved $7 billion in property losses during Harvey alone. Appx19. Congress also appropriated over $100 billion in aid to Harvey's victims, some of which Plaintiffs themselves accepted (and partially offset their compensation award). *See infra* (pp. 33-35); Opening Brief 10.

At bottom, the Corps had to decide how much flood protection to provide, and that inherently cost-driven decision must be made *any* time the government builds a flood-control project with taxpayer money. Here, the Corps decided to acquire land beyond the extent of the largest storm reasonably likely to occur during the Project's existence, but not to the extent of the 1899 storm, estimated to recur not "more than once in the lives of these structures." Appx7 (quoting

Appx8417). That decision, made before the area was developed for residential use, complied with Corps guidance in effect when the Project was built. *See* Opening Brief 31-32. It also helped the government manage taxpayer dollars prudently during World War II and readily covered normal Project operations for more than 70 years.

2. Flooding of Plaintiffs' properties was not the direct, natural, and probable result of the Corps' actions.

As explained in the opening brief (pp. 27-35), flooding damage on Plaintiffs' properties from Harvey's rain and runoff was not a taking because it resulted from the storm far more so than the Corps' emergency-response actions. That the Corps had developed a plan for operating the Project during such massive flooding conditions does not make the property invasion at issue here "foreseeable," much less the direct, natural, and probable result of Project operations. The Project manages the inevitable risks from an exceptionally rare natural disaster to minimize catastrophic property damage and loss of life. Opening Brief 35-37. It does not thereby effect a taking.

Plaintiffs focus on the CFC's unchallenged finding that the Corps was a "but-for" cause of flooding on Plaintiffs' (upstream) property. Banker Brief 20, 25, 33. But the storm itself is also a "but-for" cause of the flooding, and the government did not cause the storm. *See* Opening Brief 27-28, 37. The Corps merely operated a flood-control project in the face of the rare conditions brought

about by the storm. In any event, causation and foreseeability are independent elements of a takings claim, and failure to prove either one is fatal to Plaintiffs' case. *See*, *e.g.*, *St. Bernard Parish*, 887 F.2d at 1362 (declining to determine "whether the injury to the plaintiffs was foreseeable as a result of [the government's] actions" because "the plaintiffs have failed to establish that the … [project] caused their injury"); *Moden v. United States*, 404 F.3d 1335, 1345 (Fed. Cir. 2005) (distinguishing "that a government act was the cause-in-fact of the claimed injury" from "that the injury was predictable from the act").

Plaintiffs argue that flooding was the foreseeable result of the Corps' conduct by listing factual findings by the CFC that the government is not challenging on appeal. Banker Brief 27-30. Based on those findings, plaintiffs contend that the risk that upstream private property would be flooded during severe storms was foreseeable to the Corps in the decades leading up to Harvey. Plaintiffs' argument, however, disregards the findings' relationship with the Corps' *actions* taken to manage and operate the Project. "[T]akings liability does not arise from government inaction or failure to act." *St. Bernard Parish*, 887 F.3d at 1361 (holding no such liability from the Corps' "failure … to properly maintain the [navigation] channel or to modify the channel" to avoid flooding from Hurricane Katrina); *see also*, *e.g.*, *Issaquena County Board of Supervisors v. United States*, 84 F.4th 1359, 1365 (Fed. Cir. 2023) (same as to the "government's

failure to install pumps or to construct an additional floodway" for levee system to manage backwater flooding from the Mississippi River).

As shown in the opening brief (p. 31), the Corps acquired upstream realty based on the worst prior storm in the area, a 1935 storm, plus additional elevation and associated volume, although the Corps designed the dam's earthen embankments to detain water to an even greater degree. Appx7-8; *see* Opening Brief 31-32. That approach was consistent with the Corps' policies at the time, under which many other flood-control projects were built across the Nation. Appx5853 (Corps employee's testimony that the Corps followed its "typical approach" in acquiring land); Appx5857 (same regarding "design[ing] dams to survive water levels higher than [those] … created by the worst storm of record within the watershed"); Appx6269 (testimony by Plaintiffs' expert that the Corps "followed its standards at the time regarding land acquisition").[2] The Corps' approach also covered Project operations for more than 70 years without causing any flooding of Plaintiffs' structures until Harvey.

As Plaintiffs point out, on several occasions in recent years the Corps has reassessed the risk of upstream flooding beyond the government-owned land and studied options to address that risk. Micu Brief 31-32; Banker Brief 27-30; *see*,

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[2] The three extra vertical feet of elevation could mean 3,000 or 15,000 horizontal feet, depending on the slope of the land. *See* Appx5854 (Thomas testimony).

e.g., Appx12-13 (discussing 1995 Report (Appx10213-14; Appx10225)). The Corps responsibly reviews existing projects when physical or economic conditions change and reports to Congress on whether to modify the project or its operation or otherwise improve environmental quality in the public interest. *See* 33 U.S.C. § 549a. Within that framework, the Corps considers "real estate acquisition" beyond the scope of the original construction as a significant project modification that "require[s] authorization by Congress." Engineering Regulation 1165-2-119, https://planning.erdc.dren.mil/toolbox/library/ERs/ER1165-2-119_20Sep1982.pdf.

Here, the Corps' post-construction cost-benefit analyses recommended against acquiring additional upstream property. Appx13 (quoting 1995 Report (Appx10225)); *see also* Appx5985-86 (Corps employee's testimony about 1995, 2013 Reports); Banker Brief 6; Micu Brief 31-32. Accordingly, the Corps did not ask Congress for authorization and appropriations to purchase additional land, which at the time of the recent studies was developed with residential subdivisions and related infrastructure. If anything, the analyses and decision not to acquire land further suggest the lack of foreseeability here. But notably, as already discussed, such discretionary inaction by the government after the dams and reservoirs were constructed cannot give rise to takings liability. *See* Opening Brief 34.

Plaintiffs contend that it was foreseeable that a large storm would cause flooding on their land, but as explained in the Opening Brief (pp. 37-38), Harvey was an intervening event that broke the chain-of-causation due to the record-shattering amount of rainfall it delivered to the reservoirs. As Harvey approached Houston, no one knew or could have known at the time the Corps closed the reservoir gates precisely how the storm would develop or that the resultant rainfall and runoff would fill the reservoirs to the level they did. To be sure, the CFC found that the Corps knew that "flooding beyond the government-owned land limits in Addicks and Barker was imminent." Appx18 (internal quotation marks, brackets omitted). But that finding falls short of a factual conclusion that flooding was likely on any individual Plaintiff's property. Indeed, the reservoir gates had been closed when numerous other tropical storms and hurricanes approached Houston, and detained water had never flooded Plaintiffs' structures.[3] As such, flooding upstream of the government-owned land is not the direct, natural, or probable result of project operations during a tropical storm or hurricane.

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[3] Although one Plaintiff's property did flood during the 2016 Tax Day storm, that Plaintiff did not claim, nor did the CFC find, that flooding was attributable to the Corps' actions. *See* Appx17 n.12.

Although Plaintiffs rely heavily on the "trial court's findings" about whether flooding was foreseeable at various times *after* the Project's construction and prior to Harvey, Banker Brief 27 that time period does not matter because foreseeability must be tethered to some *action* the Corps took. Plaintiffs identify no Corps action between 1948, when the second of the two dams was completed, and 2017, when Hurricane Harvey struck. And foreseeability of flooding at the time the Project was "first contemplated," *id.*, is irrelevant under Plaintiffs' own theory of their claims, which arise from the Project's operation during Hurricane Harvey, not from the Project's original design and construction. *See* Appx1021-22 (rejecting argument that "the design of the reservoirs, the acquisition of land, [and] the calculation of design pools" was relevant to Plaintiffs' claim accrual date, which was "no earlier than 2016").[4]

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[4] Although disclaiming any reliance on a theory that inaction gives rise to their takings claims, Plaintiffs simultaneously contend that the inaction here is no different than the failure to exercise eminent domain in *any* inverse condemnation action. Micu Brief 46 n.13. But that is not so because the Plaintiffs are complaining about changes to the Project that the Corps could not make without congressional action. "Administrative agencies are creatures of statute," and "accordingly possess only the authority that Congress has provided." *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam). Traditionally, Congress has authorized the United States to carry out civil works based on reports the Chief of Engineers submits to Congress after conducting various studies. *See*, *e.g.*, *United States v. Arizona*, 295 U.S. 174, 189-90 (1935). Congress followed a similar process here. *See* Pub. L. No. 74-738, ch. 688, § 6, 49 Stat. 1570, 1592-93 (1936) (directing "preliminary examinations and surveys for flood control" at Buffalo Bayou); Pub. L. No. 75-

As for the Corps' operation of the Project in response to Hurricane Harvey, Plaintiffs contend that the Corps intentionally acted, according to its manual, to occupy Plaintiffs' properties and thereby protect downstream landowners. Banker Brief 26-27, 38. That allegation of intent is incorrect and unsupported. When the Corps closed the gates, it was aware of a risk that flooding could occur outside government-owned land. *See* Appx41 (ruling the Corps was "well aware" of the flooding risk). But a claim that the Corps disregarded even a "strong probability that harm may result" is a claim that the Corps acted recklessly or negligently (which are tort standards of liability), and not properly viewed as a claim that the Corps appropriated a property interest amounting to a taking. *See* Opening Brief 38 (explaining this difference between takings and tort standards); *cf.* Restatement (Second) of Torts § 500 cmt. f (1965) ("While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result …."). Equating the disregard of a risk, even a significant one,

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685, 52 Stat. 802, 804 (1938) (authorizing Buffalo Bayou and other projects to be carried out "in accordance with the plans recommended in the respective reports"). After construction was complete, significant changes to the Project's design, including property acquisition, would have required congressional approval. *See supra* (pp. 17-18). And the Corps was merely authorized, not required, to seek such approval, which was not guaranteed.

with intent fails sufficiently to distinguish torts from takings. In any event, even intentional flooding does not by itself establish takings liability. *See*, *e.g.*, *United States v. Sponenbarger,* 308 U.S. 256, 260 (1939) (finding no taking even though the plaintiff had alleged that the government's construction plan involved an ''intentional flooding'' of her land).

3. Plaintiffs' reasonable investment-backed expectations weigh against takings liability.

As established by the Opening Brief (pp. 39-45), a reasonable person acquiring a property like Plaintiffs' in a development on the fringes of a detention basin for a federal flood-control project would appreciate the risk of flooding on the property when a once-in-a-lifetime catastrophic storm like Harvey occurs. The public notice of flooding risk that the Corps provided through maps, plats, and outreach meetings objectively supports such a conclusion, and the CFC's contrary conclusion was error.

The properties at issue here were all undeveloped agricultural land when the dams were constructed. It is reasonable that the Corps would not purchase fee title, or even flowage easements, over undeveloped land that might be inundated during a once-in-a-millennium flood. The development that occurred on that land (and downstream) after the Project's construction was beyond the Corps' control. The property owners that chose to live in this area could not

reasonably have expected that the Project would be modified or operated differently than designed if a storm like Harvey struck.

Plaintiffs protest that they subjectively did not know of the flooding risk. Banker Brief 42-43, Micu Brief 35. But subjective expectations are inadequate—Plaintiffs' expectations must also be objectively "reasonable" under the circumstances. *See Cienega Gardens v. United States*, 503 F.3d 1266, 1288 (Fed. Cir. 2007). Here, the dams' existence was an obvious physical fact; the Corps operated them under the directions from a publicly available manual; the Corps undertook public engagement on the Project over the years; and the local governments, which are responsible for coordinating with the Federal Emergency Management Agency ("FEMA") on flooding potential in connection with determining eligibility for flood insurance, surely knew about the significance and implications of the Project. Opening Brief 39-40. A reasonable landowner should have known, too. These factors, including the responsibility of developers, landowners, and local governments are relevant under *Arkansas Game*'s multi-factor analysis, especially given Harvey's singular, unprecedented nature, and the dilemma that the storm thrust upon the Corps.

B. The Corps acted to protect life and private property during Harvey, and all real property is subject to such core exercises of governmental police powers.

1. Plaintiffs' property rights are subject to the Corps' police power to protect public safety and welfare.

The Corps' response to Harvey was not a taking for the independent reason that it was "consistent with longstanding background restrictions on property rights." *Cedar Point*, 141 S. Ct. at 2079. Those background restrictions include the government's exercise of its police powers when necessary to prevent unavoidable harms to the public, and the Corps exercised those powers here when it stored water to prevent $7 billion in losses to downstream property. Plaintiffs, all of whom purchased their upstream properties decades after the Project's construction, *see* Appx1032-1041, took title subject to the government's prerogative to exercise its police power to protect public safety, lives, and property, see Opening Brief 46-47; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). Had the Corps not temporarily detained floodwater behind the dams, increased flooding would have occurred downstream.

The government does not contend that every exercise of the police power is exempt from takings liability. But a cramped view of the necessity defense that excludes the circumstances here would impair the government's ability to protect lives and property by discouraging advance planning for remote risks. The Corps designed the dams to withstand an extraordinarily rare storm and

adopted operating procedures that anticipated how to manage the rare—indeed, singular—occurrence of a storm of Harvey's magnitude. But that does not make the Corps' operations any less necessary to avert the emergency of additional downstream property damaged and lives potentially lost. *Cf. Baker v. City of McKinney, Texas*, 84 F.4th 378, 388 (5th Cir. 2023) ("[T]he Takings Clause does not require compensation for [plaintiff's] damaged or destroyed property because, as [plaintiff] herself claims, it was objectively necessary for officers to damage or destroy her property in an active emergency to prevent imminent harm to persons.").

Plaintiffs contend that the government is advancing a "coming-to-the-nuisance argument" that is foreclosed by *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Micu Brief 20, 43-44. Plaintiffs further contend that the government's arguments about the practical consequences of narrowing the police-powers doctrine resemble cost-based arguments rejected by *Arkansas Game* and other precedents. Micu Brief 20, 45-46. Having "gamble[d]" on litigation rather than condemning the property in advance, they contend, the government must live with the consequences of that wager. Banker Brief 24. But none of that is true, and Plaintiffs miss the point. Landowners' expectations about what Congress authorized the Corps to do for the public purpose of flood control, and the attendant implications for their neighboring properties, are rationally informed

by the dilemma the Corps faced here. Namely, it operated the Project to manage floodwater from a record-shattering storm to protect downstream property while detaining water temporarily on Plaintiffs' land for the first and only time in the Project's 70-year history. That police-power dilemma rationally informs the multifactor inquiry into whether a taking occurred.

2. The Flood Control Act of 1928 embodies a background limitation on title that forecloses Plaintiffs' takings claims.

As discussed in the Opening Brief (pp. 51-55), Congress would not have undertaken the broad flood-control program administered by the Corps today had takings liability extended so far as to encompass property damage from floodwaters. The principles undergirding Section 702c of the 1928 Flood Control Act inhere in Plaintiffs' title and inform any expectations about their property interests. *Milton* misapprehended the government's argument and rejected it as a matter of immunity. *Cf.* Micu Brief 45 (arguing that *Milton* forecloses the government's reliance on the Flood Control Act); Banker Brief 59-61 (arguing that the Act does not grant immunity). So, too, the CFC here misconstrued the argument as one of "jurisdiction." Appx27.

This Court should address the government's argument on its own terms and reevaluate Section 702c's role in informing whether takings by floodings are

cognizable from the Corps' operation of flood-control projects in response to catastrophic storms. The statute's text and history strongly indicate they are not.

II. Any compensation should exclude consequential damages.

Independent of its erroneous liability ruling, the CFC erred by awarding compensation for various idiosyncratic expenses—lost profits, displacement costs, and damage to personal property—that are unrelated to the fair market value of a flowage easement. Such expenses are one-time consequential losses that are not part of just compensation for the taking of an easement.

A. Lost profits and leasehold advantage

"Just compensation," the Supreme Court has held, "means in most cases the fair market value of the property on the date it is appropriated. 'Under this standard, the owner is entitled to receive "what a willing buyer would pay in cash to a willing seller at the time of the taking." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10 (1984) (cleaned up). As shown in the Opening Brief (pp. 56-59), the CFC erred by compensating Plaintiff Scott Holland for the advantage he held as a tenant in a below-market lease. Appx76-77. Plaintiffs try to justify the CFC's ruling by citing precedents for what just compensation is owed when a leasehold is taken. Micu Brief 50-51. But the main case cited concerned compensation to "the holder of an *unexpired* leasehold interest in land." *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 303 (1976) (emphasis

added). Here, Holland's landlord cancelled his lease because Holland could not afford to make repairs and pay his rent. Appx76. Given those intervening events, the United States is not liable for Holland's consequential losses.

Similarly, the CFC erred by awarding Plaintiff Kulwant Sidhu rent and utility payments he lost while his first-floor housing unit remained temporarily vacant while flood damages were repaired, as well as the discount in rent he offered the tenant of a second-floor apartment that did not flood. Opening Brief 57-59. Those lost profits and damages to Sidhu's ongoing business operations are consequences of his independent decisions how to operate that business; they are not the direct result of the Corps' operating the dams. *See United States v. General Motors*, 323 U.S. 373, 380 (1945) (just compensation excludes "losses to [a] business"). Plaintiffs respond that the Corps appropriated the underlying business and its assets, not merely the profits. Micu Brief 52-53. But Sidhu's private, residential leasehold—even assuming it is actually a business asset—cannot be divorced from the underlying real property interest, for which Plaintiffs are being compensated. That Harvey's flooding affected Plaintiffs' claimed ability to earn rental revenues from their real property does not entitle them to such consequential losses as additional just compensation.

B. Displacement costs

The CFC also erred by awarding Plaintiffs "displacement costs" of securing temporary housing while their homes were repaired after Harvey's flooding. Appx82; Opening Brief 59-61. Such expenses are the consequence of the flooding, not the Corps' operation of the dams, and are unrelated to the fair market value of a flowage easement. Plaintiffs attempt to justify the award primarily by relying on *General Motors* and *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), *see* Micu Brief 55-56, but those cases are distinguishable for the reasons explained in the Opening Brief (pp. 59-60); *see also United States v. Reynolds*, 397 U.S. 14, 16 (1970) (providing that the "basic measurement of compensation" is "fair market value of the property at the time of the taking"), *cited in* Banker Brief 66. The CFC's approach would compensate Plaintiffs not only for the market value of a flowage easement at the time of taking, but also for the expenses incident to the Corps' permissible use of that flowage easement. And in the unlikely event that a 700- to 900-year storm flood recurs, Plaintiffs' theory is that nothing in the CFC's ruling precludes requiring payment *again*. That result is a tort-damages approach, not just compensation for an easement's fair market value, and it reinforces the CFC's errors in its finding of takings liability. *See supra* (pp. 3-23).

C. Personal property and structures

The CFC likewise erred by awarding damages to personal property and structures from Harvey's floodwaters. Appx77-81; Opening Brief 61-62. The Corps' operation of the dams never directly or intentionally appropriated an easement over Plaintiffs' real property, much less appropriated any *personal* property for a public use. The trove of items listed on Plaintiffs' inventories for which the CFC awarded compensation—furniture, clothing, toys, tools, and more, *see* Appx11377-416; Appx80-81—were affected only because they happened to be located in houses reached by the floodwaters. Unlike the raisins in *Horne v. USDA*, 576 U.S. 350 (2015), *cited in* Micu Brief 47; Banker Brief 63, Plaintiffs' personal property was not the subject of the Corps' regulation. And unlike cases Plaintiffs cite about crops and timber, *see* Micu Brief 48-49; Banker Brief 64, the miscellaneous items here are movable goods unconnected to the underlying realty or the Corps' use of the flowage easement.

As for structural damage, the court erroneously added repair costs to the easement's full fair market value. Fair market value is the touchstone for just compensation. *Kirby Forest Industries*, 467 U.S. at 10. Moreover, like with dislocation expenses, nothing in the CFC's decision absolves the Corps of having to pay for structural repairs again in the future if flooding recurs. *Cf. Keokuk & Hamilton Bridge Company v. United State*s, 260 U.S. 125, 126-27 (1922)

(a single blasting operation by the United States in a navigable stream causing repairable damage to private structure was a tort). And that makes no sense as a rule of compensation for the permanent taking of an easement.

III. The Court should reject Plaintiffs' arguments on cross-appeal.

A. The CFC did not err by denying some Plaintiffs compensation.

Cross-Appellant Catherine Popovici contends that the CFC erred by denying her compensation. Micu Brief 57-58. That contention should be rejected, as the CFC did not clearly err in its award to Ms. Popovici. *See Gadsden Indus. Park, LLC v. United States*, 956 F.3d 1362, 1373 (Fed. Cir. 2020).

Just compensation concerns indemnity. It is "measured by the property owner's loss rather than the government's gain." *Brown v. Washington Legal Foundation*, 538 U.S. 216, 235-36 (2003). "[T]he private party 'is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.'" *Id.* at 236 (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)). To award a landowner "less would be unjust to him; to award him more would be unjust to the public." *Bauman v. Ross*, 167 U.S. 548, 574 (1897); *see*, *e.g.*, *United States v. Cors*, 337 U.S. 325, 332 (1949). As the landowners, Cross-Appellants bear the burden to prove the amount of compensation, and the CFC's determination is reviewed for clear

error. *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 273 (1943); *accord Otay Mesa Property, L.P. v. United States*, 779 F.3d 1315, 1322, 1325 (Fed. Cir. 2015).

The CFC did not clearly err on this point. Unlike other claimants, Ms. Popovici did not experience any flooding inside her home, although floodwater did reach the foundation and affected her garage. Appx21; Appx62 n.16. The CFC thus awarded her less compensation than other claimants, explaining: "The government did not flood homes on the Popovici … propert[y,] and the Popovici's garage suffered only limited damage, so the just compensation award for them is lower." Appx76 (citing Appx7201; Appx7203 (testimony about damage to garage-door frame)). The CFC thus awarded Ms. Popovici $1,401.49, Appx77, the cost for "repairs to her garage." Appx81(stating that the amount for garage repairs was "included in [Popovici's] just compensation award for real property" and not awarded separately); *see also* Appx75 ("The awards account for repairs only to … the Popovici's garage, and for only those costs the plaintiffs incurred to restore their property to their pre-taking state.").[5]

Ms. Popovici characterizes the award as zero compensation for the easement and argues it was error, citing the government expert's appraisal of the

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[5] The CFC also found that Ms. Popovici failed to prove any damage to her personal property from the government's easement, a conclusion she does not challenge on appeal. Appx81.

easement's value at $5,000. Micu Brief 58. But while compensation for repairing structures was erroneous, *see supra* (pp. 30-31), Opening Brief 61-62, it was permissible for the court to award zero dollars, or a nominal value, in just compensation for the taking of an easement. *See Gadsden Indus. Park*, 956 F.3d at 1373 (upholding zero-damages award for a taking); *Otay Mesa*, 779 F.3d at 1322-26 (holding it was not clear error for CFC to deny compensation for permanent easements to install and operate "seismic intrusion" sensors, including one-foot above-ground antennas); *accord Brown*, 538 U.S. at 240 n.11 ("[J]ust compensation for a net loss of zero is zero."). Moreover, the CFC was not required to accept a party's damages methodology or accept either side's appraisal. *See Gadsden Indus. Park*, 956 F.3d at 1372 ("It was not unreasonable for the trial court to conclude that neither [side] provided sufficient evidence to calculate just compensation with reasonable certainty."); *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 832 (Fed. Cir. 2010).

B. The CFC correctly offset compensation with grants Plaintiffs received in connection with their property.

Cross-Appellants challenge the CFC's ruling that their compensation must be offset by money they received from FEMA to compensate for their property losses. Micu Brief 58-62. They contend that the offsets are

impermissible, and that the government failed to prove that duplicate recovery would otherwise occur. Cross-Appellants' challenges, however, lack merit.

The CFC determined that FEMA already paid Cross-Appellants "to compensate [them] for the very same property losses and damages that they seek to recover here," that it cannot claw-back the awards, and that "[f]ailing to deduct [those] payments would constitute duplicate recovery." Appx83-84. Cross-Appellants assert that this Court may offset just compensation only by "special benefits" that exclude FEMA payments because they were not sufficiently related to the taking or to the "value of the remaining land." Micu Brief 59-60. The rule of just compensation, however, is not so rigid. *See id.* at 54. As already discussed (p. 31), a landowner must be made whole, but not more. Indeed, Plaintiffs who are not cross-appealing agree that the offsets "ensur[ed] that they did not receive a greater award" than their losses. Banker Brief 65, 66.

Cross-Appellants do not contend that they may receive duplicate recovery. *See Olson*, 292 U.S. at 255.[6] Instead, they assert that the government

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[6] The "special benefit" test Cross-Appellants invoke is a narrow application of the broader principle against duplicate recovery in the context of evaluating whether government activities do not effectuate a taking because although inflicting slight damage to property in one respect, they confer great benefits when measured in the whole. *See*, *e.g.*, *Hendler v. United States*, 175 F.3d 1374, 1382 (Fed. Cir. 1999) (discussing "special benefit" test in a case applying *Sponenbarger*). But the government did not raise that defense here, and the CFC

did not prove that offsetting the FEMA payments was necessary to avoid double recovery. Micu Brief 61-62. That assertion should be rejected. As already noted, the CFC found that double recovery would result, and Plaintiffs do not challenge that finding as clearly erroneous. *Id.* They contend that the government's evidence concerned overly broad categories of expenses covered by the FEMA payments, and that such proof of such expenses should have been required at a more granular level. But as the CFC acknowledged, Dan Leistra-Jones, the government expert economist, testified that the award categories Cross-Appellants identify are similar to items they claim as "personal property losses." Appx68; *see also* Appx7694-95 (testimony). Indeed, Cross-Appellants' proffered inventories reveal many items readily categorized as food, first-aid, or personal hygiene. Appx11383-413. There is no clear error in the offsetting.[7]

C. Challenges to the denial of class certification lack merit.

Cross-Appellants challenge the CFC's denial of class certification on the grounds that the CFC clearly erred in construing the record facts about the

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did not base its ruling on *Sponenbarger*. Appx83. Nothing in those cases limits *Olson*'s broader principle against duplicate recovery.

[7] That the statute authorizing the FEMA awards prohibits duplicate recovery reinforces the correctness of the CFC's offset. 42 U.S.C. § 5155(a) (directing the President to assure that anyone "suffering losses as a result of a major disaster" will not receive financial assistance "with respect to any part of such loss as to which he has received financial assistance … from … any other source").

motion's timing, and that the CFC erred as legal matter by relying on the motion's timing to deny certification. Micu Brief 63-68. Those arguments fail.

Cross-Appellants begin by suggesting that the CFC erred by denying class certification based on a "misreading of the record." Micu Brief 66. They contend that they filed their motion after the liability ruling because the CFC told them to do so. But that contention is factually and legally flawed. Initially, the case was assigned to then-Chief Judge Braden, who set an early deadline for the filing of any motion for class certification. *See* Appx2014 (referencing November 9 deadline from ECF-13 at 8 in Case No. 17-1189). In what Plaintiffs wrongly imply prevented them from filing such a motion, Micu Br. 63-64, Judge Braden relieved the parties of that early deadline to file class-certification motions and an accompanying deadline for the government to answer the complaints. Appx2193 (giving government counsel "an oral instruction" that the government had "nothing to do" regarding a November 6, 2017 deadline to respond to the complaints). The case was later reassigned to Judge Lettow, who denied Plaintiffs' class-certification motion both because it was untimely and due to Plaintiffs' failure to satisfy the criteria of CFC Rule 23. Appx201.

Cross-Appellants place great weight upon Judge Braden's oral statement, early in the proceedings, Appx2192, that Plaintiffs need not respond to the government's motion to set uniform deadlines, including for class certification.

But that did not absolve Plaintiffs of the need to timely request certification. The government repeatedly urged Judge Braden to resolve class certification before moving forward with test-property litigation or discovery. Appx2294-96; ECF-113:6, 9 (proposed schedule). Yet Judge Braden was adamant that it would be inappropriate to do so. Appx2285 (scheduling order calling class certification "premature"); Appx2307-08 (order denying motion to vacate schedule); Appx2356-57 (hearing transcript). Judge Braden's reason for believing delay was inappropriate was incorrect, as Judge Lettow's later ruling denying certification makes clear. Appx203-205. That ruling accords with seven courts of appeals to address the issue by holding "that a trial on the merits of liability is a line after which moving for class certification is presumptively inappropriate." Appx204. Plaintiffs do not challenge the substance of Judge Lettow's ruling as legally incorrect, as they never explain why the presumption is incorrect and have thus forfeited that argument. Micu Brief 67 (stating in a single sentence that equitable considerations permit post-liability certification); *see*, *e.g.*, *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319-20 (Fed. Cir. 2006) (ruling that an argument was forfeited on appeal where not fully developed in opening brief).

Instead, Plaintiffs contend that they were entitled to rely on Judge Braden's approach solely by pointing to her concern that, by delaying a decision on class certification, she might prevent a situation where bellwether plaintiffs

were selected and their claims resolved, only for the government then to try non-bellwether plaintiffs' claims anew. Micu Brief 64 (citing Appx2330-31, 2334, discussing *United States v. Winstar Corp.*, 518 U.S. 839 (1996)). But even assuming that concern were valid, it could be mitigated by imposing a deadline for claimants to opt-into the class. Judge Braden's displeasure with how the government litigated prior cases therefore was not a valid reason for Plaintiffs to postpone seeking class certification.[8]

Moreover, Plaintiffs' reliance on Judge Braden's erroneous case-management direction that an early class-certification motion would be premature was unreasonable for other factual reasons. While Judge Braden changed her mind whether to require Plaintiffs to file a class certification motion at an early stage, Plaintiffs point to nothing in the record *prohibiting* them from filing their motion before liability was determined. Indeed, in *St. Bernard Parish Government v. United States*, which Judge Braden adjudicated, the plaintiffs moved for class certification, but the motion was stayed, and a ruling on the issue deferred until after the liability opinion. 126 Fed. Cl. 707, 733-39 (2016), *rev'd on other grounds*, 887 F.3d at 1368; *see* Pls.' Mot. to Certify Class, *St. Bernard*

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[8] The CFC's rule "contemplates only opt-in class certifications, not opt-out classes." CFC Rule 23, comm. note. In contrast, class actions under Rule 23 of the Federal Rules of Civil Procedure are opt-out class actions. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

Parish, *supra*, (No. 05-1119). Plaintiffs could have taken a similar, precautionary approach here, even if they did not believe it was legally required.

Even assuming that Judge Braden did prevent Plaintiffs from filing such a motion, Judge Lettow later revisited the issue of when Plaintiffs would seek certification, effectively lifting any bar on such filing. Although he asked Plaintiffs about the timing of their class-certification motion, Judge Lettow never "instructed Plaintiffs to wait" to file that request. Micu Brief 65. Instead, he observed that there was "no mention of a motion for class certification" and asked, "Would someone one the plaintiffs' side care to address that?" Appx2205-2206. After Plaintiffs said that they planned to move for certification concurrent with the liability litigation, Judge Lettow observed that he preferred to address jurisdiction before liability and stated that this preference "might affect your thinking on class certification." Appx2206. When Plaintiffs' counsel responded that they would file the motion "during the merits briefing," the judge responded, "That makes sense." Appx2207.

Because that colloquy between Judge Lettow and Plaintiffs' counsel is best understood as a two-way conversation, the CFC did not clearly err by finding "no basis" that the court "instructed or asked them" to delay their certification motion. Micu Brief 65-66. That is especially so given the deference that Judge Lettow's interpretation of his own statements should receive. *Cf. Amado v.*

Microsoft Corp., 517 F.3d 1353, 1358 (Fed. Cir. 2008) ("A [trial] court's interpretation of its order is entitled to deference unless the interpretation is unreasonable or is otherwise an abuse of discretion.").

Even if the CFC's discussion of the issue amounted to advice or instruction, Plaintiffs had an independent duty to assess whether the court's proposal adequately protected their interests. *See*, *e.g.*, *In re American Safety Indemnity Co.*, 502 F.3d 70, 73 (2d Cir. 2007) ("Litigants should not seek legal advice from judges or judicial staff, and in any case, attorneys should know better than to rely on such advice."). To the extent that Judge Lettow's assessment of the class certification motion's timeliness differed from earlier statements by Judge Braden, Plaintiffs fail to show that Judge Lettow's untimeliness ruling was clearly erroneous or an abuse of discretion. *See*, *e.g.*, *McKay v. Novartis Pharmaceutical Corp.*, 751 F.3d 694, 704 (5th Cir. 2014) ("We therefore review the decision by a trial judge to reconsider a prior trial judge's interlocutory ruling for abuse of discretion." (internal quotation marks omitted)); *United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990) (noting it is "within the sole discretion" of the transferee court to determine if prior rulings by the transferor court should be reconsidered). That is especially so given Judge Lettow's reliance on seven other courts of appeals' rulings that post-liability

motions for class certification are presumptively improper. Appx203 (citing *In re Citizens Bank, N.A.*, 15 F.4th 607, 618 n.11 (3d Cir. 2021) (collecting cases)).

CONCLUSION

For the foregoing reasons, the CFC's judgment should be reversed. If the Court reaches the issues in Plaintiffs' cross-appeal, the CFC's judgment should be affirmed as to those issues.

Respectfully submitted,

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