UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

RICHARD & WENDY DEVILLIER, et al., Plaintiffs, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil Action No. 3:20-cv-00223 Jury Trial Demanded

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiffs Richard Devillier, Rhonda Devillier, Laurence Barron, Randy & Monica Brazil, Charlie Carter, Rhonda Glanzer, Bruce & Tina Hinds, William Oliver, Fesi Energy, LLC, Gulf Coast Olive Investments, LLC, and Southeast Texas Olive, LLC, individually and on behalf of all persons similarly situated) (collectively the "Class Representatives" or "Movants"), ask this Court to certify a Class and two Subclasses to determine the State's liability for the taking of real and/or personal property through flooding caused by the State's design, construction, operation, and maintenance of Interstate Highway 10 (the "Project").

Because of differences in precipitation and the extent of Project construction at the time of the Harvey and Imelda events, Movants request certification of two Subclasses: (1) those owners or lessees of real and/or personal property that flooded during Tropical Storm Harvey because of the State's Project; and (2) those owners or lessees of real and/or personal property which flooded during Tropical Storm Imelda because of the State's Project. Both the Class and each of the Subclasses meet the Fed. R. Civ. P. 23(a) requirements for certification.

Excluded from Class and Subclass membership are the Defendant, the State of Texas, its legal representatives, affiliates, heirs, successors-in-interest, or assigns, and any person or entity who is entitled to assert an affirmative legal defense of sovereign immunity (but not any person or entity entitled to assert a defense of governmental immunity).[1]

[1] *See Lubbock Cty. Water Control & Imp. Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 300 n.4 (Tex. 2014) ("'Sovereign immunity' protects the State and state-level governmental entities, while 'governmental immunity' protects political subdivisions of the State such as counties, cities, and districts like the Water District in this case."); *Dallas Cty. Hosp. Dist. v. Hospira Worldwide, Inc.*, 400 S.W.3d 182, 184 n.1 (Tex. App.—Dallas 2013, no pet.) ("Courts often use the terms 'sovereign immunity' and 'governmental immunity' interchangeably. However, 'sovereign immunity' refers to the State's immunity from suit and liability, while 'governmental immunity' protects political subdivisions

Movants request certification under Fed. R. Civ. P. 23(b)(2) for a declaration under Count 5 of their First Amended Master Complaint that the State is liable to the Class and Subclass Members for the taking, damaging, or destruction of their real and/or personal property rights without compensation as required by Article I, section 17 of the Texas Constitution and/or the Fifth and Fourteenth Amendments to the United States Constitution.

Movants also seek certification under Fed. R. Civ. P. 23(b)(3) and 23(c)(4) for a determination that the State is liable to the Class Members for the taking, damaging, or destruction of their real and/or personal property rights without compensation as required by Article I, section 17 of the Texas Constitution and/or the Fifth and Fourteenth Amendments to the United States Constitution as alleged in Counts 1 and 2 of Plaintiffs' First Amended Master Complaint.

Movants request only that the question of whether the State is liable to Plaintiffs be determined on a class-wide basis; certification with regard to the quantum of compensation due any Class Member is not sought. Determination of the State's liability to members of the Class and Subclasses, leaving for adjudication any questions regarding the quantum of damages suffered by each Class Member, is a paradigmatic circumstance for application of Fed. R. Civ. P. 23(c)(4) and will promote an efficient resolution of the entire controversy. See 7AA C. Wright, A. Miller & M. Kane, FED. PRAC. & PROC. CIV. § 1790 (3d ed. April 2021 update) (hereafter, "Wright, Miller & Kane").

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of the State, including counties, cities, and school districts." (citing *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 702 n.3 (Tex. 2003)).

ARGUMENT AND AUTHORITIES

The State's liability for the alleged takings should be determined on a class-wide basis.

I. The standards applicable to class certification.

Federal Rule of Civil Procedure 23 governs whether a proposed class should be certified. The party seeking class certification "bear[s] the burden of proof to establish that the proposed class satisfies the requirements of Rule 23." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012). Movants "must affirmatively demonstrate [their] compliance with the Rule—that is, [they] must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, and so on." *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 545-46 (5th Cir. 2020) (internal quotations omitted) (emphasis in original).

"To obtain class certification, parties must satisfy Federal Rule of Civil Procedure 23(a)'s four threshold requirements, as well as the requirements of Rule 23(b)(1), (2), or (3)." *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 252 (5th Cir. 2020). The class certification inquiry requires a "rigorous analysis," which often requires a court "to probe behind the pleadings before coming to rest on the certification question." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011).

II. The Class and Subclasses satisfy the Fed. R. Civ. P. 23(a) requirements.

"The Federal Rules of Civil Procedure and relevant caselaw enumerate five preliminary requirements that every class must satisfy to be eligible for certification: numerosity, commonality, typicality, adequacy of representation, and ascertainability." *Earl v. Boeing Co.*, No. 4:19-CV-507, 2021 WL 4034514, at *13 (E.D. Tex. Sept. 3, 2021); *see also John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("The existence of an ascertainable class of

persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23.").

A. The Class and Subclasses meet the Rule 23 ascertainability requirement.

"To maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable. However, the court need not know the identity of each class member before certification; ascertainability requires only that the court be able to identify class members at some stage of the proceeding." *Seeligson v. Devon Energy Prod. Co., L.P.*, 761 F. App'x 329, 333-34 (5th Cir. 2019) (affirming certification of a class of royalty owners as ascertainable since public records provided sufficient objective criteria from which to identify class members, citations omitted). "To prove ascertainability, a party need only demonstrate at some stage of the proceeding that the class is adequately defined and clearly ascertainable." *Earl*, 2021 WL 4034514, at *16 (citations omitted).

The Class and Subclasses meet the ascertainability requirement. The State's liability will rest, in part, on whether its Project acted to obstruct the natural flow of stormwater runoff. The real property records of Chambers, Liberty, and Jefferson counties will provide objective, confirmable evidence of those Class Members who property within the geographic area encompassed by the impounded reservoir pool created by the State's Project. *See Seeligson*, 761 F. App'x at 334 (affirming finding a class ascertainable where public records provided sufficient objective criteria from which to identify class members); *see also Navelski v. Int'l Paper Co.*, 244 F. Supp. 3d 1275, 1305 (N.D. Fla. 2017) (class met ascertainability requirement where class boundaries were defined in objective terms and the names and addresses of the proposed

class members could be determined by reference to real property records). The Class, and each Subclass, meet Rule 23's ascertainability requirement.

B. The Class and Subclasses meet the Rule 23 numerosity requirement.

Rule 23's numerosity requirement directs that there must be enough members in the proposed class that "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *Pederson v. La. State Univ.*, 213 F.3d 858, 868–69 & n.11 (5th Cir. 2000). The record confirms that the Class and Subclasses meet the numerosity requirement. And the State has informed Movants that it does not contest numerosity.[2]

C. The Class and Subclasses meet the Rule 23 commonality requirement.

Rule 23(a)'s commonality requirement asks whether the claims of Class and Subclass Members depend on "questions of law or fact common to the class" such that their determination will resolve an issue central to each claim in "one stroke." *Wal-Mart*, 564 U.S. at 350. The number of common questions does not matter, one will suffice, provided it is critical to resolving the class members' claims. *See id.* at 359 ("We quite agree that for purposes of Rule 23(a)(2) 'even a single common question' will do.") (cleaned up). Based on a review of the evidence and consideration of "the claims, defenses, relevant facts, and applicable substantive law," *Chavez*, 957 F.3d at 546, the commonality requirement is satisfied "where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453

[2] In addition to the public property records from Chambers, Liberty, and Jefferson counties which identify hundreds of parcels of property with different owners that are contained within the Area of Interest, *see, e.g.*, Exhibit A, Declaration of E. Lawrence Vincent, ¶ 2. Movants stand ready, if and when requested, to provide further proof of the "reasonable estimates" of the number of Class and Subclass Members are sufficient to find joinder of all Class and Subclass Members in a single action impractical. *See Pederson v. La. State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000).

(2016) (cleaned up) (quoting 2 W. Rubenstein, NEWBERG ON CLASS ACTIONS § 4:50, at 196-97 (5th ed. 2012) (hereafter, "NEWBERG")).

And "the common element may be one of fact or law and need not be one of each. It is well settled that the requirement of 'common questions of law or fact' in Rule 23(a) is disjunctive; that is, either a question of law or a question of fact will suffice. Thus, for example, factual differences are not fatal to a class action if common questions of law exist." NEWBERG § 3:21 (citations omitted). The claims of the Class and Subclass Members share common questions of both law and fact.

1. Common issues of law support certification.

The State of Texas, in its Motion to Dismiss Plaintiffs' Amended Master Complaint (filed on June 4, 2021) effectively conceded that many common issues of law exist when it sought dismissal as to "all plaintiffs" on host of commonly-applicable legal issues:

- All Plaintiffs' Fifth Amendment claims must be dismissed since they were not filed pursuant to 42 U.S.C. § 1983, and that statute is the only vehicle by which federal constitutional claims can be brought, ECF 44 at 6;
- All Plaintiffs' Fifth Amendment claims must be dismissed because "[t]he Fifth Amendment to the Constitution is only applicable to the United States and federal actors." *id.* at 6;
- All Plaintiffs' Fifth Amendment claims must be dismissed because the Takings Clause provides no self-executing constitutional claim against the State, *id.* at 6-7;
- All Plaintiffs' Fifth Amendment claims "based on Hurricane Harvey" must be dismissed on limitations grounds, *id.* at 8;
- All Plaintiffs' Fifth Amendment claims must be dismissed based on the State's immunity from liability, which has not been waived, *id.* at 8-9;
- All Plaintiffs' Fifth Amendment claims must be dismissed because no Plaintiff owns a property interest that is constitutionally protected against a taking by the State, *id.* at 9-10; and
- All Plaintiffs' state constitutional claims must be dismissed based on their failure to properly plead the requisite intent for such a claim, *id.* at 10-11.

These issues of law—each an affirmative defense that the State has asserted applies to every Plaintiff and the putative Class as a whole—each independently supports certifying the issue of the State's liability *vel non* for determination in "one stroke." *Wal-Mart*, 564 U.S. at 350.

Beyond the State's defenses, the legal question of whether the State's use of private properties north of the Project to store impounded waters in order to maintain the public's access to the eastbound lanes south of the median barriers for emergency and other purposes, as well as to protect those properties downstream from the highway from flooding, constitutes a "public use" presents a core and common question of law to be determined on a singular set of facts. *See Cascott, L.L.C. v. City of Arlington*, 278 S.W.3d 523, 528 (Tex. App.—Fort Worth 2009, pet. denied) ("Whether a particular use of property constitutes a public use or purpose is a question of law to be decided by the courts.") (citations omitted); *see also Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 801 (Tex. 2016) ("We have recognized that a taking may occur 'if an injury results from either the construction of public works or their subsequent maintenance and operation. . . .'") (citing *City of Tyler v. Likes*, 962 S.W.2d 489, 505 (Tex. 1997)); *State v. Hale*, 146 S.W.2d 731, 736-37 (Tex. 1941) ("Public roads are a great public convenience, and, if necessary to carry out plans for the completion of a public road, private property may be totally or partially taken or damaged to accomplish that purpose. This carries with it the power, if need be, that a servitude may be created on land not actually taken or occupied by the public highway, for the purpose of carrying off the water, the natural flow of which is changed or diverted by the construction of such highway."); *State v. Malone*, 168 S.W.2d 292, 297 (Tex. Civ. App.—Austin 1943, writ ref'd w.o.m.). ("The damage here complained of was clearly for a public use. The construction and maintenance of the highway were acts of the

State, performed by its authorized instrumentalities."); *see also id.* at 298 (discussing *State v. Hale* and providing that "this language was used in considering the exact question now before us in connection with an exact factual situation, the construction of a highway without providing sufficient drainage facilities. So considered, it cannot be construed as to preclude liability of the State where the [State Highway Department and Highway C]ommission has failed to provide such drainage facilities.

By its own admission, the State (through its agents) constructed and intended the Project's traffic median barrier as a flood control measure, to enhance public safety, and to facilitate use of the eastbound lanes of Interstate Highway 10 as an evacuation route during storm/flood conditions.[3] The State made the political and economic decision to use the properties north (upstream) of the highway to store detained stormwaters, rather than put in adequate drainage facilities to convey the anticipated floodwaters south (downstream) of the highway—or to then construct detention facilities downstream.[4] Such common evidence provides a basis to support the common legal question of "public use" and serves to support certification. *Shipes v. Trinity Indus., Inc.*, No. TY-80-462-CA, 1982 WL 1759, at *9 (E.D. Tex. July 30, 1982) ("Rule 23(a)(2) requires that there be questions of law or fact common to the class. On its face, the rule does not mandate absolute commonality; nor does the rule require common questions of law and fact. The language of the rule is disjunctive. Factual differences among the claims of members of the class are not fatal, if common questions of law exist.").

[3] Exhibit A, Declaration of E. Lawrence Vincent, ¶ 3.

[4] STATE 3738-39, 3776 (Exhibit A, Declaration of E. Lawrence Vincent, ¶ 4).

2. Common issues of fact support certification.

Common factual issues affecting all Class Members independently support certification. In 2014, the State, acting through its Department of Transportation, embarked on a project to upgrade Interstate Highway 10 by "reconstructing and widening the existing [IH]-10 to a six-lane highway (3 lanes in each direction) consisting of 12-foot wide travel lanes, 10-foot wide outside shoulder, and 10-foot wide inside shoulder with a concrete median barrier."[5] As noted at the Project Kick Off meeting, the singular project was "broken into three CSJ's; CSJ 1 is from west project limits to the county line, CSJ 2 is from the county line to east of Hamshire Rd., CSJ 3 is from east of Hamshire Rd. to the east project limits."[6] And as the State assured the neighboring property owners from the very first public meeting in March 2016 that the hydraulic design for its Project would be "in accordance with current Federal Highway Administration (FHWA) and TxDOT design policies," and that it "would permit the conveyance of the 100-year flood . . . without causing significant damage to the facility, stream, or other property."[7] However, the State's assurances were made three months prior to when the actual drainage analysis for even the first part of its Project had been done.[8]

[5] STATE 009379-81 (Exhibit A, Declaration of E. Lawrence Vincent, ¶ 4).

[6] Exhibit B, Affidavit of Jamshid Jahangiri, Attachment 1 at 3. A "CSJ" is a "control-section-job" number used to track a project in the TxDOT Design and Construction Information System. *See* http://onlinemanuals.txdot.gov/txdotmanuals/dci/creating_updating_project_information.htm (last accessed October 15, 2021); *see also id.*, Attachment 1 at 2 (July 30, 2015) (noting project limits "from west of Winnie to east of FM 365"); STATE 008727-38 (Exhibit A, Declaration of E. Lawrence Vincent, ¶ 4) (October 3, 2014 aerial photos showing extent of project).

[7] STATE 009379-81 (Exhibit A, Declaration of E. Lawrence Vincent, ¶ 4).

[8] STATE 3185-217 (Exhibit A, Declaration of E. Lawrence Vincent, ¶ 5).

Two aspects of the Project involved TxDOT raising the elevation of the highway and installing a new solid concrete barrier between the east and west-bound lanes. The miles of uninterrupted median barrier along IH-10 without slots at the base prevent the passage of water between the north and south sides, creating a weir[9] that blocked stormwater runoff on the north side of the highway during both Tropical Storm Harvey and Imelda. While the two storm events generated different amounts of water, the variation on the two pools resulted from the different status of the Project over time, not the rain events.[10]

Figure 1 - Harvey Flooding to Median Height

[9] A weir is defined as "[a] dam placed across a river or canal to raise or divert the water . . . or to regulate or measure the flow." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE at 2025 (3d ed. 1992). Here, the term is used in its "more general definition in engineering to apply to any hydraulic control structure that allows water to flow over its top, often called its crest." *What is a Weir*, PRACTICAL ENGINEERING, https://practical.engineering/blog/2019/3/9/what-is-a-weir.

[10] As long as the amount of deposited water exceeds the weir's storage capacity (i.e., excess water overtops the median and continues to flow downstream) the variation in the storm events is irrelevant. In both Harvey and Imelda, the State's Project retained storm water to the height of the median barriers and impounded that water upstream on private property. The Subclasses account for pool variation between events, which reflects continued and further development of the Project over time.

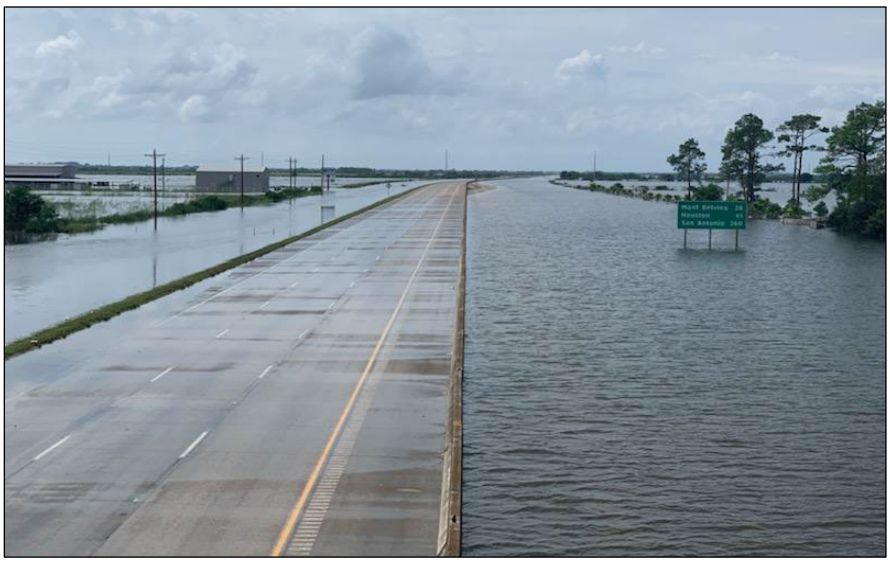

Figure 2 - Imelda Flooding to Median Height

The State intentionally caused flooding to each Class Member's property. Proof of each Class Member's claim rests on a unitary set of relevant facts, and these facts will be applied to the same substantive legal principles—whether the state or federal takings standards—to establish liability against the State at trial:

⇒ To establish an inverse condemnation claim under Article I, Section 17 of the Texas Constitution, a property owner must show that there has been: (1) an intentional government act by a government entity; (2) that resulted in the taking, damaging, or destroying of a property owner's property; (3) which was done for public use. *Gen. Servs. Comm'm v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 598 (Tex. 2001).

⇒ To establish an inverse condemnation under the Fifth Amendment, a property owner must prove that the property owner possessed a protectable property interest in what property owner alleges the government has taken, and that the effects property owner experienced were the predictable result of governmental action which was sufficiently substantial to justify a takings remedy. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003).

While differences exist between the standards for state and federal takings, the inquiries to satisfy them share many aspects which, in the context of this action, can be determined on common proof.

Each Class Member alleges that (a) the State physically invaded their property with retained stormwater for several days after Harvey and/or Imelda and that (b) this physical inundation constituted a taking of that property. Whether the flooding that any specific member of the Class or Subclass experienced was caused by a reservoir pool created during Tropical Storms Harvey and/or Imelda as a result of the State's Project will be answered based on data and modeling that does not vary based on the location, ownership, or characteristics unique to any specific parcel of property.

Both key experts on the question of causation agree that common facts and analyses that can be used to model both the Harvey and Imelda events.[11] These commonly-adduced facts include:

a. the size, hydrology, and hydraulic factors germane to the pertinent watersheds and floodplains such as their topography, land cover data and applicable roughness coefficients;
b. the duration, quantity, and timing of rainfall over the pertinent watersheds and floodplains that provide unitary data concerning each rainfall event;
c. the specific rainfall gradients and drainage analyses (including the runoff hydrographs generated from the two tropical storm events);
d. the Project's as-built dimensions and elevation of the roads, highways, cross drainage structures and inline hydraulic structures;
e. the analysis of the State's design criteria and the ability of the pertinent drainage facilities to accommodate surface water runoff;
f. the hydrologic analysis and determination of maximum flows and capacities as calculated based on existing culvert dimensions, industry-standard Manning's n values, slope reports by the State's agents as well as field-verified slopes;
g. the analysis and comparison to flows with specific return periods (determined from NOAA Atlas 14 Point Precipitation Frequency Estimates) of Q 2-yr, Q 5-yr, Q 10-yr, Q 25-yr, Q 50-yr and Q-100 yr;

[11] *See* Exhibit C, Declaration of Dr. Anish Khanal, ¶¶ 3, 5; Exhibit D, Declaration of Dr. Michael Slattery, ¶¶ 3, 5.

h. the regional regression equations used to determine flow capacities including Asquith and Slade (1997), Asquith and Roussel (2009), and Omega EM regressions, which will provide evidence of whether the Project's drainage facilities had the ability to convey discharges from the upstream watersheds;

i. water levels and rainfall, and an intensity-duration-frequency analysis of the rainfall and water levels for both Tropical Storms Harvey and Imelda, resulting in development of hydrographs for both storms across the affected watersheds; and

j. a set of rainfall-runoff relationships will be established to determine the timing of flow attenuation throughout the affected watersheds, which will allow determination of the precise timing and duration of any overbank (i.e., riverine) flooding within the watersheds upstream of I-10 during the two storms and the interaction of overbank flooding with any potential pool created by the State's Project.[12]

The analyses, opinions, and testimony—and their factual bases—will be common to all properties and property owners and will not vary with regard to, or based upon, the particular circumstances of any individual property or property owner.[13]

Likewise, the question of whether the State possessed the requisite knowledge or intent sufficient to assign it liability for a taking under either state or federal law is subject to common proof. The State intentionally used those properties north of the highway as a detention impoundment reservoir for excess stormwater runoff which the State knew would not be accommodated by the drainage facilities. *See* ECF 43 at 19, ¶ 53. The evidence of what knowledge or intent the State possessed does not, and it will be that same evidence that will suffice (or not) to prove the requisite intent for each Class member's claim.[14]

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[12] *See* Exhibit C, Declaration of Dr. Anish Khanal; Exhibit D, Declaration of Dr. Michael Slattery.

[13] *Id.*

[14] During the design and prior to the construction of the Project, affected citizens told State officials (including officials at TxDOT) of the drainage problems and damage that would be caused to their properties by the State's actions, and that the State knew it would be storing detained storm water. *See generally* STATE 9309 (Exhibit A, Declaration of E. Lawrence Vincent, ¶ 4).. Indeed, even after the State saw (and was directly told of) the damage caused to private property during Tropical Storm Harvey, it continued construction of its Project—with the responsible elevated traffic barrier further

Because questions of fact common to each and every Class Member are dispositive of their claims, and as the claims arise out of a single course of conduct (a single highway Project) and are based on a single theory of liability, Rule 23(a)'s commonality requirement is satisfied. *M.D. v. Perry*, 294 F.R.D. 7, 28 (S.D. Tex. 2013). *Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 570-71 (S.D. Tex. 2000).[15]

D. The Class and Subclasses meet the Rule 23 typicality requirement.

Significant overlap exists between the Rule 23 requirements of typicality and commonality. *Wal-Mart*, 564 U.S. at 349, n.5. Chief Judge Rosenthal recently noted that "[a] named plaintiff who can show commonality can usually show typicality." *In re Chesapeake Energy Corp.*, No. CV H-21-1215, 2021 WL 3725983, at *8 (S.D. Tex. Aug. 23, 2021). Indeed, Chief Judge Rosenthal explained the overlap between the standards:

> Typicality addresses whether the class representative's claims have the same essential characteristics of those of the putative class. Typicality does not require a complete identity of claims. Typicality is not as concerned with strengths of the named and unnamed plaintiffs' cases as with the similarity of legal and remedial theories behind their claims. Factual differences will not defeat

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extended down the center of IH-10—which again detained rainfall runoff during Tropical Storm Imelda, and again flooded thousands of acres of Movants' private property. STATE 7955 (Exhibit A, Declaration of E. Lawrence Vincent, ¶ 4). *See City of Keller v. Wilson*, 168 S.W.3d 802, 830 (Tex. 2005) (proof that agency knew its plans were substantially certain to increase flooding, especially after flooding had once occurred, supported intent element for state constitutional claim).

[15] This case tracks the recently-tried *In re Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs*, 146 Fed. Cl. 219 (2019), in which the Court of Federal Claims found the federal government liable to owners of private property for flooding caused during Harvey due to the design, construction, maintenance, and operation of the Addicks and Barker dams. *See also In re Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs*, 148 Fed. Cl. 274, 277-78 (2020) (defining geographic scope of permanent flowage easement taken based on area inundated by the government's project). It also compares to many classes certified in Rails-to-Trails cases, which are based on a single governmental action: the issuance of a Notice of Interim Trail Use or Abandonment ("NITU"). *See, e.g.*, *Geneva Rock Products, Inc. v. United States*, 100 Fed. Cl. at 788-89 (2011) ("There can be little question that the government acted on grounds applicable to the entire class in this case. The NITU was a single act that affected all putative class members.").

> typicality if the named plaintiffs and putative class members have claims that arise from a similar course of conduct and share the same legal theory.

In re Chesapeake Energy, 2021 WL 3725983, at *8; *see also M.D. v. Perry*, 294 F.R.D. at 29 ("Typicality requires a showing that the claims of the named plaintiffs are in fact those asserted as the common class claims. In this sense, typicality is commonality addressed from the perspective of the named plaintiffs. . . . Typicality requires showing that, in fact, the proposed representatives have that claim."); *Silver Buckle Mines, Inc. v. United States*, 132 Fed. Cl. 77, 100 (2017) (noting that typicality serves a similar purpose as commonality and is demonstrated "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability").

Movants satisfy the typicality requirement because, in their role as representative parties, each has brought the same claim and seek the same liability determination based on the same set of operative facts regarding the State's actions and the hydrologic and hydraulic factors implicated by the unitary State construction Project as each Member in the Class and Subclasses. *Cf. In re Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs*, 146 Fed. Cl. 219, 227-28 (2019) (noting that the test property plaintiffs asserted the same claim: that the government actor was liable to them for an uncompensated taking caused by the government-controlled inundation of their properties by impounded floodwater).

Each Class Representative makes the same claims as every Class and Subclass Member: that the State's actions constituted a taking of their property. All were inundated by water intentionally stored by the State on and over their real and personal property in August/September 2017 and September 2019 in the same manner, by the same mechanism, and following the same set of factual events and actions. Like every Class and Subclass

Member, each Class Representative contends that the maximum inundation suffered during both Harvey and, later, Imelda was caused solely by the actions of the State in its design, construction, operation, and maintenance of the Project.[16] The issues to be joined at trial concerning the liability of the State—both factually and legally—are the same as those that would be joined for each of the Class Members. For that simple fact alone, the Class, and both Subclasses, meet Rule 23's typicality requirement.

E. The Class, Subclasses, and Class Counsel, meet the Rule 23 adequacy requirement.

The adequacy of representation requirement "encompasses three separate but related inquiries (1) the zeal and competence of the representatives' counsel; (2) the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees; and (3) the risk of conflicts of interest between the named plaintiffs and the class they seek to represent." *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 130 (5th Cir. 2005) (cleaned up, quoting *Berger v. Compaq Comp. Corp.*, 279 F.3d 313, 313-14 (5th Cir. 2002)); *see also Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 412 (5th Cir. 2017) (same considerations); *Silver Buckle Mines*, 132 Fed. Cl. at 100 ("There are two aspects to the adequacy requirement: (1) the existence of conflicts between the putative class representative and members of the proposed class, and (2) the qualifications and capabilities of proposed class counsel.") (citing *Wal-Mart*, 564 U.S. at 349 & n.5). Both aspects of the adequacy requirement are met here.

[16] Exhibit D, Declaration of Dr. Michael Slattery, ¶¶ 5, 7.

1. The Class Representatives meet the adequacy requirements.

"The first component of the adequacy requirement addresses whether there are any conflicts of interest precluding a plaintiff from serving as class representative." *Silver Buckle Mines*, 132 Fed. Cl. at 101 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997)). In determining adequacy, courts also consider whether the class representatives have enough understanding of the case to be able to control or prosecute the litigation and whether they are willing to take an active role in controlling the litigation. *Feder*, 429 F.3d at 129-30 (citing *Berger*, 257 F.3d at 482-83).

Movants seek the same claim as each of the Class Members. The takings claim of each Class Member is not diminished or otherwise negatively impacted by the adjudication of the takings claims of the Class Representatives (or vice versa). No Class Representative is subject to any legal defense that is different from, or inapplicable to, the Class or either Subclass. And none are positioned in any manner otherwise antagonistic to other Class Members.[17]

To address the issue of adequacy, each Movant has acknowledged and agreed to perform their duties as a Class Representative: to represent the interests of all Members of the Class; to consider the interests of the Class just as they would consider their own interests; to participate actively in the lawsuit, such as by testifying at deposition and trial, answering written

[17] The definition of the proposed Class and Subclasses excludes those whose interests might be antagonistic to Class Members' interests—the Defendant, the State of Texas, as well as any person or entity who is entitled to assert a defense of sovereign immunity and the legal representatives, affiliates, heirs, successors-in-interest, or assigns of any such excluded person or entity. *See e.g.*, *Rougier v. Applied Optoelectronics, Inc.*, No. 4:17-CV-02399, 2019 WL 6111303, at *7 (S.D. Tex. Nov. 13, 2019) (recommending certification of class with similar exclusion of potentially antagonistic members), *report and recommendation adopted*, No. 4:17-CV-2399, 2019 WL 7020349 (S.D. Tex. Dec. 20, 2019). Should a conflict later become evident, the Court has discretion to modify the Class and/or Subclass to address the changed circumstance. *In re Monumental Life Ins.*, 365 F.3d 408, 414 & n.7 (5th Cir. 2004).

interrogatories; to keep generally aware of the status and progress of the lawsuit; to make every effort to provide counsel and the Court all relevant facts of which they are aware; to recognize that they are to represent many other entities and people with similar claims because they understand that it is important that all benefit from the lawsuit equally and they believe that a class lawsuit will save time, money, and effort, and will benefit all parties, and the Court; and to accept that any resolution of the lawsuit, such as by settlement or dismissal, is subject to Court approval and must be structured in the best interest of the Class as a whole.[18] Movants qualify as adequate Class Representatives.

2. Class Counsel meet the adequacy requirements.

When appointing class counsel, the court must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A). The court may also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). Movants request that Daniel Charest, Charles Irvine, and Larry Vincent be appointed Class Counsel and that the law firms of Burns Charest LLP, and Irvine & Conner, PLLC be designated "of counsel" to the Class. The State has agreed to not contest the adequacy of counsel.[19]

[18] Exhibit A, Declaration of E. Lawrence Vincent, ¶ 6.

[19] Proposed Class Counsel possess directly relevant experience and a proven track record as co-lead counsel for upstream plaintiffs in *In re Addicks and Barker (Texas) Flood-Control Reservoirs*. In years of litigation, proposed Class Counsel have identified and investigated thousands of potential claims on behalf of class members and have demonstrated an in-depth knowledge of the applicable law and

III. The Class and Subclasses meet the Rule 23(b) requirements.

As noted, in addition to the Rule 23(a) requirements, Plaintiffs must show certification is proper under Rule 23(b)(1), (2), or (3). Adjudication of the State's liability to Plaintiffs as alleged in Count 5 of their First Amended Master Complaint (declaratory judgment) should be certified under Rule 23(b)(2), and determination of the State's liability to Plaintiffs as alleged in Counts 1 and 2 of their First Amended Master Complaint (state and federal takings provisions) should be certified under Rule 23(b)(3).

A. Certification is proper under Rule 23(b)(2) for a declaration pursuant to Count 5 of the Master Amended Complaint that the State is liable to the Class and Subclasses for a taking of property without compensation.

Rule 23(b)(2) applies where "the party opposing the class has acted or refused to act on grounds thatapply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2); *see also In re Rodriguez*, 695 F.3d 360, 365 (5th Cir. 2012) ("Instead of requiring common issues, [Rule] 23(b)(2) requires common behavior by the defendant toward the class."). The Supreme Court explained the application of Rule 23(b)(2) for declaratory relief:

> The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.

Wal-Mart, 564 U.S. at 360 (quotation marks omitted) (citation omitted); *see also id.* at 362-63 ("When a class seeks an indivisible injunction benefitting all its members at once, there is no

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relevant facts. Even without this appointment, proposed Class Counsel and their firms possess significant success, experience, and resources to adequately represent the Class. Movants stand ready, if and when requested, to further demonstrate proposed Class Counsel's collective adequacy.

reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident.").

Count 5 of the Plaintiffs' Amended Complaint seeks declaratory relief regarding the liability of the State for the harm they suffered from flooding during Tropical Storms Harvey and/or Imelda. ECF 43. The State's behavior that applies generally to the classes is its single highway improvement construction Project that all Plaintiffs claim to have been harmed by in the same way: by flooding caused by the intentional retention rainfall runoff upstream of the State's Project and highway structure. The Court should certify the Class because the State of Texas has acted on grounds generally applicable to all proposed Class Members: the design, construction, operation, and maintenance of the "improvements" to IH-10. Declaratory relief as to the State's liability (or not) occasioned by the Project's detention of water during Tropical Storms Harvey and/or Imelda is appropriate across the entire Class (and both Subclasses). Fed. R. Civ. P. 23(b)(2); *Wal-Mart*, 564 U.S. at 360-61; *Yates v. Collier*, 868 F.3d 354, 367-68 (5th Cir. 2017).

B. Certification is proper under Rule 23(b)(3) as to Counts 1 and 2 of the Master Amended Complaint that the State is liable to the Class and Subclasses for the taking of property without compensation.

Plaintiffs moving for certification under Rule 23(b)(3) must demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The question becomes whether the proposed Class and Subclasses "are sufficiently cohesive to warrant

adjudication by representation." *Unger v. Amedisys, Inc.*, 401 F.3d 316, 320 (5th Cir. 2005) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). That standard is met here.

1. The questions of law or fact common to members of the Class and each Subclass predominate over any questions affecting only their individual members.

Requiring that common issues predominate over individual issues "prevents the class from degenerating into a series of individual trials." *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (quoting *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 738 (5th Cir. 2003)). Movants ask this Court to certify for class-wide determination the issue of whether the State is liable to the Class and Subclass Members for the taking, damaging, or destruction of their real and/or personal property rights without compensation as required by Article I, section 17 of the Texas Constitution and/or the Fifth and Fourteenth Amendments to the United States Constitution. This is an issue class.

"The ability to certify issue classes accords the courts discretion to realize the advantages and efficiencies of classwide adjudication of common issues when there also exist individual issues that must be tried separately." NEWBERG § 4:89. A "broad consensus" exists in support of issue certification,[20] including its use in this Circuit. *See In re Deepwater Horizon*,

[20] *See Rahman v. Mott's LLP*, 693 F. App'x. 578, 579 (9th Cir. 2017) (certification of an issues class under Rule 23(c)(4) is appropriate "if it materially advances the disposition of the litigation as a whole"); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 490-91 (7th Cir. 2012) (Posner, J.) (noting that, although individual trials "may be necessary to determine which class members were actually adversely affected … and if so what loss each class member sustained[,]" issue certification remained efficient because "at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful" and, therefore, "[t]he practices challenged in this case present a pair of issues that can most efficiently be determined on a class-wide basis"); *In re Nassau County Strip Search Cases*, 461 F.3d 219, 222 (2d Cir. 2006) (directing the district court to certify a class as to the issue of liability, notwithstanding the fact that the action as a whole was not appropriate for class treatment, in action challenging a blanket strip search policy); *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986) (approving the use of issue certification in mass tort asbestos

739 F.3d 790, 806, 815-16 (5th Cir. 2014) (affirming certification of a liability-only class under Rule 23(c)(4)); *In re Rodriguez*, 695 F.3d at 363, 369 n.13 (affirming class-wide entitlement to injunctive relief regardless of damages and noting that "Rule 23(c)(4) explicitly recognizes the flexibility that courts need in class certification by allowing certification with respect to particular issues and division of the class into subclasses" (cleaned up) (quoting *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000))); *Horton v. Goose Creek Independent School Dist.*, 690 F.2d 470 (5th Cir. 1982) (certifying issue of liability only in action brought challenging school district's use of canine contraband detection program).

With respect to certifying an issue class, the Fifth Circuit has noted expressly that employing an issue class to "'determin[e] liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed.'" *In re Deepwater Horizon*, 739 F.3d at 806 n.66 (quoting *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th. Cir. 2013)(Posner, J.)).

"Determining whether the plaintiffs can clear the predominance hurdle set by Rule 23(b)(3) requires [the Court] to consider 'how a trial on the merits would be conducted if a class were certified.'" *Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 555 (5th Cir. 2011) (quoting *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Ins. Indem. Co.*, 319 F.3d 205, 218 (5th Cir. 2003)). Considering whether the case should be tried in an issue class "entails identifying the

litigation because it would conserve significant judicial resources); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013) (affirming certification of a liability class that reserved all issues concerning damages for individual determination); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (observing that observing that class "must be able to show that their damages stemmed from the defendant's actions that created the legal liability").

substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class." *Madison*, 637 F.3d at 555 (quoting *O'Sullivan*, 319 F.3d at 738).

The substantive issues that will control the outcome at a liability trial concern the State's design, construction, operations, and maintenance of Interstate Highway 10, and whether the State's actions caused the flooding of private properties to the north of IH-10 owned or leased by the Class and Subclass Members. The trial of those issues need only happen once. Individualized questions concerning Class Members' damages, including the extent of the property taken and the quantum of compensation owed, are not at issue for liability. Moreover, such individualized issues of damages should not preclude certification in any event. *See* 7AA Wright, Miller & Kane § 1790 (noting that certification of a liability class—reserving all issues concerning damages for subsequent, individual determinations—secures the advantages and economies of adjudicating issues that are common to the entire class on a representative basis even though other issues in the case, such as individualized damages may need to be litigated separately by each class member); *see also Tyson Foods, Inc.*, 577 U.S. at 453 (noting that a proposed (b)(3) class may be certified as long as "one or more of the central issues in the action are common to the class and can be said to predominate . . . even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members"); *Bell v. United States*, 123 Fed. Cl. 390, 401 (2015) ("The size of individual properties varies in every takings case, and has never defeated class certification."). Indeed, as the Court of Federal Claims has noted with regard to the inverse condemnation actions for which it is responsible, "[i]f the need for individual

damages calculations was determinative, 'there scarcely would be a case that would qualify for class status in this court.'" *Land Grantors in Henderson, Union & Webster Ctys., Ky. v. United States*, 71 Fed. Cl. 614, 624 (2006) (quoting *Taylor v. United States*, 41 Fed. Cl. 440, 444 (1998)). Those individual trial that proceed on the issue of quantum of compensation, will benefit from the work done in the proposed issue class. And trying liability once—on common issues and proof—brings efficiency to the overall process.

2. Certification of the Class and Subclasses is the superior method to determine the State's liability to the Class and Subclasses members for the taking of their property without compensation.

Rule 23(b)(3) also requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." When determining evaluating the propriety of a class procedure, courts must consider alternative methods to determine whether class treatment is superior:

> [T]he court initially must consider what other procedures, if any, exist for disposing of the dispute before it. . . . It then must compare the possible alternatives to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court.

7AA Wright, Miller & Kane § 1779 (listing potential options to class treatment). A comparison of class treatment to Section 1779's alternatives shows that class-wide determination of the State's liability to the hundreds of Class Members is superior to any other procedure.

The sheer number of potential plaintiffs alone compels a finding that class-wide adjudication of the State's liability is the superior procedure:

> [I]f the interested parties are so numerous that their joinder or intervention would burden the court or the number of individual actions would be quite large, a Rule 23(b)(3) action should be allowed. . . .When the impracticability

> requirement in subdivision (a)(1) has been satisfied, requiring class members to consolidate their claims or bring separate actions typically will not be considered superior to a class action, assuming that the rights of the absentees can be adequately protected, inasmuch as judicial economy may be served best by one action in which all the claims are litigated."

7AA Wright, Miller & Kane § 1779 (emphasis added).

Without certification, this Court faces the unrealistic prospect of litigating the same issues, based on the same evidence, and applying the same substantive law to hundreds of individualized actions. If each individual case must be adjudicated, that process not only would waste money, time, and judicial resources, but also may lead to conflicting results. And, in the interim, the Court would be faced with a never-ending docket of repetitive litigation. All that would combine to thwart relief to the individuals and/or exoneration to the State. Certification stands as the only procedural mechanism to achieve economies of time and resources and to avoid the potential for "inconsistent determinations at separate trials and by judgments that do not bind all members of the class." 7AA Wright, Miller & Kane § 1779. Any suggestion that all claimants get in line, pay the full freight, and wait their turn to eventually—after years and costs—finds no rational support. *See In re Tetracycline Cases*, 107 F.R.D. 719, 727 (W.D. Mo. 1985) (issue certification appropriate where "the issues covered by the request be such that their resolution (as a class matter) will materially advance a disposition of the litigation as a whole"); 7AA Wright, Miller & Kane § 1778 at 57.

Section 1779 suggests, as an alternative to class treatment, the possibility that the application of res judicata might render a test case approach superior to class treatment. AA Wright, Miller & Kane § 1779 ("A class action may not be the superior means of relief if the res judicata effect of a judicial decision on the legal issue will serve the same purpose.") That

is true as far as it goes. But the suggestion cannot stand here without an agreement by the State that a determination of liability as to a set of test properties and plaintiffs will bind the State as to all others it flooded by its Project during Harvey and Imelda; otherwise a series of never-ending trials over the reach and application of *res judicata* is inevitable. Nor do Section 1779's suggested MDL model or non-judicial/administrative processes offer any viable alternative.

Finally, and independently, certification is a superior alternative because the required notice and opportunity to opt out will provide and protect significant due process concerns regarding each Class Member. The State is not required to notify any property owner that it is alleged to have taken a flowage easement over their property. Without notice, affected property owners may never know about their claims and the property rights which have been taken from them. Using real property records, GIS mapping, and LIDAR readings to express the geographic extent of the Class, Class Counsel intend to identity of each property potentially impacted by the State's Project-induced flooding and provide notice door to door, owner to owner – in addition to a comprehensive notice plan to identify and notify renters, former owners, and others who may have lost property rights.

Aside from notice of their claim and right to participate in the liability ruling, notice will address other important aspects of case management and provide a pathway to completing this case. For example, notice will address, *inter alia*, (a) establishment of a class administration professional to coordinate opt out issues and notice; (b) timing to opt out, how to opt out, and the effects of opting out; and (c) projections on handling the compensation process for the Class should liability be found. No mechanism other than the requested certification realistically serves to handle the hundreds of potential claims that exist and must be

adjudicated. Class treatment on the issue of liability is the superior procedure—indeed the only viable procedure—to resolve all these identical pending and potential cases.

CONCLUSION

Movants request this Court certify the Class and two Subclasses to determine the State's liability for the taking of real and/or personal property through flooding caused by the State's design, construction, operation, and maintenance of Interstate Highway 10 as set forth herein.

Dated: November 15, 2021.

Respectfully submitted,

/s/ Daniel H. Charest

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Counsel for Plaintiffs

CERTIFICATE OF CONFERENCE

I hereby certify that Plaintiffs have conferred with counsel for Defendant, the State of Texas, and the State opposes the relief sought by this motion.

/s/ Daniel H. Charest
Daniel H. Charest

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on November 15, 2021, via ECF to all counsel of record, pursuant to the Federal Rules of Civil Procedure.

/s/ Daniel H. Charest
Daniel H. Charest