

No. _____

**In the
Supreme Court of the United States**

NORTHERN CALIFORNIA WATER
ASSOCIATION, ET AL.,

Petitioners,

v.

CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD, ET AL.,

Respondents,

**On Petition For Writ of Certiorari
To The California Court of Appeal
For The Third Appellate District**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States operates the Central Valley Project (CVP), the largest reclamation project in the United States, and obtains water rights for the CVP from the State of California. In fiscal year 2003-2004, the California Legislature enacted a statute that shifted funding for the State Water Resources Control Board (State Water Board) from the General Fund to those with permits and licenses for water, including the United States. Cal. Water Code § 1525(a). The statute provides that if the United States “will not pay the fee . . . based on the fact that the fee payer has sovereign immunity[,]” the tax may be imposed on “entities who have contracts for the delivery of water from the [United States].” *Id.* §§ 1540, 1560(a).

The State Water Board passed through 100 percent of the tax imposed on the United States’ CVP water rights to those who contract with the United States for water service (CVP Water Contractors), even though, of the 116 million acre-feet under permit or license for all CVP purposes, the CVP Water Contractors have contracts for only 6.6 million acre-feet, or 5 percent of the total. The California courts found that this funding process was constitutional under the Supremacy Clause. Thus, the question presented is:

Is a California statute imposing a direct tax on the United States’ property interest in water constitutional if it is applied in a manner that passes through 100 percent of that tax to the United States’ contractors when those contractors’ beneficial interest in the taxed water is, at most, 5 percent of the total water being taxed?

PARTIES TO THE PROCEEDING

Petitioners in this Court, who were petitioners and plaintiffs below, are the Central Valley Project Water Association, Northern California Water Association; California Farm Bureau Federation; Arvin-Edison Water Storage District; Banta-Carbona Irrigation District; Byron-Bethany Irrigation District; City of Roseville; Contra Costa Water District; Del Puerto Water District; East Bay Municipal Utilities District; El Dorado Irrigation District; Glenn-Colusa Irrigation District; Imperial Irrigation District; James Irrigation District; Maxwell Irrigation District; Meridian Farms Water Company; Natomas Central Mutual Water Company; Patterson Irrigation District; Pelger Mutual Water Company; Placer County Water Agency; Pleasant Grove-Verona Mutual Water Company; Princeton-Codora-Glenn Irrigation District; Provident Irrigation District; Reclamation District No. 108; Reclamation District No. 1004; Reclamation District No. 1606; River Garden Farms Company; Sacramento Municipal Utility District; San Benito County Water District San Juan Water District; San Luis Water District; Santa Clara Valley Water District; Stockton East Water District; Sutter Mutual Water Company; The West Side Irrigation District; West Stanislaus Irrigation District; and Westlands Water District.

Additional petitioners and plaintiffs below, who are not Petitioners here, are 2017 Ranch Ltd Partnership; Agency 5; Alta Vista Ranch; Anderson, Marian; Anderson, Violet M.; Area #25-Keswick;

Baber, Jack W.; Baber, Jack, et al.; Baber, Judith S.; Bella Vista Water District; Bengard, Terry M.; Bengard, Tom; Blythe, Bruce W.; Blythe, Jr., Harry E.; Broadview Water District; Browns Valley Irrigation District; Busbee, Rosemarie K.; Calaveras County Water District; Cavanaugh, Carmel; Centerville Community Services District; Centinella Water District; Central San Joaquin Water Conservation District; Chenowith, Craig S. Revocable Trust Date 11/6/96; Chiappe Farms, Inc.; Chimney Rock Ranch; City of Coalinga; City of Fresno; City of Santa Clara; City of Tracy; City of West Sacramento; Claiborne, Darin and Laura; Clear Creek Community Services District; Colusa County Water District; Colusa Drain Mutual Water Company; Colusa-Solano JPA; Cordua Irrigation District; Corning Water District; Cortina Water District; County of Colusa; County of Sacramento; County of Shasta; Cushman, Jack A.; Danna & Danna Inc.; Davis Water District; Delta Breeze Partners LLC; Denny Land & Cattle Company, LLC; Dixie Valley Ranch (John B. Crook); Dunnigan Water District; Eagle Field Water District; El Solyo Water District; Exeter Irrigation District; Feather Water District; Fresno Irrigation District; Fresno Slough Water District; Friant Power Authority; Garcia Family Trust; Garden Highway Mutual Water Company; Georgetown Divide Public Utility District; Glide Water District; Gorrill Land Company; Gray, William T.; Groteguth, Lawrence B.; Gruenthal, William A.; Hanke, Dennis; Helen K. Dixon Trust/H&L Partnership/Richter Bros./Henry Richter; Hershberger, David; Hills Valley Irrigation

District; Igo-Ono Community Service District; Irving, James S.; Irving, W. G.; Isaac, Judith W.; Ivanhoe Irrigation District; James J. Stevinson, A Corporation; Jennings, Richard L.; Jensen, Albin; Jones, Jim; Kanawha Water District; Kelsey, Horace G.; KIDCO#11 LP; Kings River Conservation District; Klein, Richard; Knaggs Farming Company LP; Knaggs Walnut Ranches Company LP; La Grande Water District; Laguna Water District; Lake Alpine Water Company; Landini, Mike; Leal Family Trust; Ledbetter Farms Inc.; Lindmore Irrigation District; Lindsay-Strathmore Irrigation District; Lower Tule River Irrigation District; M&T Incorporated; Madera-Chowchilla Water and Power Authority; Mathis, Glenn E., Jr.; Megan Ledbetter; Merced Irrigation District; Mercy Springs Water District; Mills, Chris; Mesquita, Anna M.; Murphy, Bob J.; MJM; Monterey County Water Resources Agency; Montna, Alfred G. & Gail E. Montna Family Trust; Moore, Richard; Mountain Gate Community Services; Murphy Lake Farms; Murphy, Donald D.; Muzzi, Nicola D.; Noble, Andrew; North Marin Water District; Odysseus Farms Partnership; Orange Cove Irrigation District; Orland Unit Water Users Association; Orland-Artois Water District; Oro Loma Water District; Pacheco Water District; Pajaro Valley Water Management Agency; Palo Verde Irrigation District; Panache Water District; Park Livestock Company; Pereira, Patricia; Peter Redfern Lecompt; Pixley Irrigation District; Plain View Water District; Plumas Mutual Water Company; Porterville Irrigation District; Powers John R III & Janey H. Revoc Trust dated 9/6/00; Proberta Water

District; Rag Gulch Water District; Ray Mulas; Reclamation District 999; Redfern Ranches, Inc.; Reimers, Hollis E.; Richard L. Jennings; River Bend Vineyards, Ltd.; Riverside Vineyards, LLC; Rollin, Cyrus M.; Rosemary Weaver, Trustee of Trust; Sacramento County Water Agency; Saucelito Irrigation District; Schaad, Garreth B.; Semitropic Water Storage District; Shafter-Wasco Irrigation District; Shasta Community Services District; Shasta County Water Agency/County Service; Shasta County Water Agency/County Service Area #25 – Keswick; Silverado Premium Properties; Silverado Premium Properties II; Silverado Premium Properties LLC; Smith Family Living Trust; Smith, Maudrie (Tumbling T Ranch); Solano County Water Agency; Solano Irrigation District; South Sutter Water District; Southern San Joaquin Municipal Utility District; Spanfelner, C. David; Spanfelner, Gary A.; Spence, William A.; Spence, William W. (Louise Spence, Trustee); Spencer, Michael; Spurlock, James M.; Spurlock, Jerry; Staudenraus, Robert P.; Steve Chiappe; Stevinson Water District; Stony Creek Water District; Sutter Extension Water District; Tea Pot Dome Water District; Terra Bella Irrigation District; The Westside Irrigation District; Thermalito Irrigation District; Thomas Creek Water District; Thomas Creek Water District; Tranquility Irrigation District; Tranquility Public Utility District; Tridam Power Authority; Tri-Valley Water District; Trust of Jesse Hawkins Cave III; Turlock Irrigation District; Turlock Irrigation District and Modesto Irrigation District; U.S. El Dorado National Forest; UCC Vineyards Group; Vickie Mulas;

Wallace Brothers Wallace, Robert L.; Wallace, WP & RL dba Wallace Brothers; Weaver Properties, LLC; Weaver, William, Jr.; Westcamp, Charles, W.; Westrope Ranches, Ltd.; Westside Water District; Widren Water District; Woodbridge Irrigation District; Yolo County Flood Control and Water Conservation District; Yuba County Water Agency; Zumwalt Mutual Water Company; Alameda County Farm Bureau; Amador County Farm Bureau; Butte County Farm Bureau; Calaveras County Farm Bureau; Colusa County Farm Bureau; Contra Costa County Farm Bureau; Del Norte County Farm Bureau; El Dorado County Farm Bureau; Fresno County Farm Bureau; Glenn County Farm Bureau; Humboldt County Farm Bureau; Imperial County Farm Bureau; Inyo-Mono County Farm Bureau; Kern County Farm Bureau; Kings County Farm Bureau; Lake County Farm Bureau; Lassen County Farm Bureau; Los Angeles County Farm Bureau; Madera County Farm Bureau; Marin County Farm Bureau; Mariposa County Farm Bureau; Mendocino County Farm Bureau; Merced County Farm Bureau; Modoc County Farm Bureau; Monterey County Farm Bureau; Napa County Farm Bureau; Nevada County Farm Bureau; Orange County Farm Bureau; Placer County Farm Bureau; Plumas-Sierra County Farm Bureau; Riverside County Farm Bureau; Sacramento County Farm Bureau; San Benito County Farm Bureau; San Bernardino County Farm Bureau; San Diego County Farm Bureau; San Joaquin Farm Bureau Federation; San Luis Obispo County Farm Bureau; San Mateo County Farm Bureau; Santa Barbara County Farm Bureau; Santa Clara County

Farm Bureau; Santa Cruz County Farm Bureau; Shasta County Farm Bureau; Siskiyou County Farm Bureau; Solano County Farm Bureau; Sonoma County Farm Bureau; Stanislaus County Farm Bureau; Tehama County Farm Bureau; Trinity County Farm Bureau; Tulare County Farm Bureau; Tuolumne County Farm Bureau; Ventura County Farm Bureau; Yolo County Farm Bureau; and Yuba-Sutter County Farm Bureau.

Respondent, who was a real party in interest below, is the United States of America by and through the Department of the Interior.

Respondents, who were respondents and defendants below, are the California State Water Resources Control Board and the California Department of Tax and Fee Administration.

RULE 29.6 STATEMENT

None of the Petitioners in this Court has a parent corporation, and no publicly held company owns 10 percent or more of any of these entities' stock.

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The Central Valley Project Water Association, Northern California Water Association, California Farm Bureau Federation, Imperial Irrigation District, Westlands Water District, et al., respectfully petition for a writ of certiorari to review the judgment of the Third Appellate District of the California Court of Appeal.

OPINIONS BELOW

The opinion of the Third District Court of Appeal is reported at 230 Cal. Rptr. 3d 142 (2018), and is included at App. 1-52. The California Supreme Court decision summarily denying review of that decision is unreported and is included at App. 205. The 2013 decision of the Sacramento County Superior Court, on remand from the 2011 California Supreme Court decision, is unreported, and is reprinted at App. 53-97. The opinion of the California Supreme Court, remanding to the Superior Court, is reported at 247 P.3d 112 (2011), and is included at App. 98-133.

The original opinion of the Third District Court of Appeal is depublished, but reported at 53 Cal. Rptr. 3d 445 (2007), and is included at App. 134-90. The 2005 decision of the Sacramento County Superior Court is unreported and is reprinted at App. 191-204.

JURISDICTION

The Third District Court of Appeal issued its opinion on March 2, 2018, and the California Supreme Court denied review, without comment, on May 16, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The constitutional, statutory, and regulatory provisions involved in this case are lengthy and are set forth in their entirety in the Appendix. Article VI, Clause 2 of the United States Constitution is included at App. 206. Section 1525 of the California Water Code (2003) is included at App. 207-09. Section 1540 of the California Water Code (2003) is included at App. 210. Section 1560 of the California Water Code (2003) is included at App. 210-11. Section 1073 of title 23 of the California Code of Regulations (2004) is included at App. 212-14.

STATEMENT OF THE CASE

A. Factual Background

The CVP was originally authorized as a state project under California's Central Valley Project Act of 1933, but due to California's inability to raise funds, the United States authorized the project and took ownership and operational control in 1935. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728 (1950). The CVP is the largest water reclamation project in the country, California's largest water supplier, and serves "the multiple purposes of flood control, irrigation, municipal use, industrial use, power, recreation, water-quality control, and the protection of fish and wildlife." See *California v. United States*, 438 U.S. 645, 651 (1978). The CVP requires the exercise of cooperative federalism, as the United States owns and operates the CVP while California administers the water

rights necessary to divert water for the CVP. *Id.* at 650-52. The State Water Board is the state agency responsible for administering those water rights. For water rights acquired after 1914, the State Water Board issues permits and licenses that give the permittee or licensee the right to use a certain amount of water under certain conditions.

In 2003, the United States held CVP permits for almost 116 million acre-feet of water, which accounted for 22 percent of the water rights in California. The United States held these permits in support of its responsibility to operate the CVP. Over 200 entities, referred to here as the CVP Water Contractors, contract with the United States to deliver water stored by the CVP. The CVP Water Contractors' contracts account for only 6.6 million acre-feet of water. In most years, the CVP Water Contractors receive significantly less water than is provided for in their contracts because of the need for water to meet other of the multiple authorized purposes of the CVP, state environmental regulations, and federal Endangered Species Act restrictions, and because of varying hydrological conditions. In some years, some CVP Water Contractors receive no water.

The Water Rights Division, the branch of the State Water Board responsible for the water rights program, was historically supported by the State's General Fund. In 2003, the California Legislature enacted Senate Bill (SB) 1049, a package of statutes intended to shift the financial burden of supporting California's water rights program from the General

Fund to a fee-based structure paid for by a subset of water users. The new statutory scheme imposed annual fees on appropriative water rights holders with permits and licenses, including the United States. Cal. Water Code § 1525(a). The statutes allowed the State Water Board to allocate to federal contractors *any* fees that the United States refused to pay based on sovereign immunity. Cal. Water Code §§ 1540, 1560(b).

For fiscal year 2003-2004, the first year the fee structure was operative, the Legislature instructed the State Water Board to recover \$4.4 million through the new fees, and the General Fund would pay \$4.6 million to cover the Water Right Division's expenses through the end of the 2003 calendar year while the State Water Board worked to enact the new structure. In fiscal year 2004-2005 and every year thereafter, the Water Rights Division was to be entirely fee supported.¹

¹ This case involves only fiscal year 2003-2004. Because the State Water Board assesses the fees annually, litigation pertaining to every fiscal year since 2003-2004 is stayed in California court, or the deadline by which to file a case is tolled by stipulation among the parties to this litigation, in recognition that the outcome of this case affects all future years. The total amount collected in fees for fiscal year 2003-2004 was \$7.4 million. Each year, the State Water Board's budget, and the amount of fees assessed, increases. Fiscal year 2017-2018 is the fifteenth year that the State Water Board has imposed these fees. The resolution of all fee years will be directly affected by the instant Petition.

The fee structure is supported by annual fees imposed on “[e]ach person or entity who holds a permit or license to appropriate water[.]” Cal. Water Code § 1525(a). The term “person,” for purposes of this statute, included “the United States, to the extent authorized by federal law.” Cal. Code Regs. tit. 23, § 1061(e). The State Water Board calculated that, in fiscal year 2003-2004, the United States’ CVP permits and licenses accounted for 116 million acre-feet of water.² App. 159. For fiscal year 2003-2004, the State Water Board assessed almost \$2.5 million in annual water rights fees against the United States out of a total \$4.4 million which was to be collected from all possible payors.

The United States refused to pay the fees assessed to it based upon sovereign immunity. In response, the California Board of Equalization sent delinquency statements to the United States. The United States then sent a letter to the State Water Board, advising the State Water Board that the water rights fee is a tax on the United States in violation of the United States Constitution. This

² The regulations provided for a 30 and 50 percent discount for hydropower permits and licenses, so only 86 million acre-feet of United States’ permits and licenses were subject to fees. However, because the non-federal permits and licenses were responsible for more hydropower diversions than those possessed by the United States, the proportion and amount of fees allocated to United States actually increased by almost 20 percent. Moreover, these hydropower-related fees were billed to the CVP Water Contractors, with CVP power contractors being billed nothing.

letter also addressed the beneficial interest of federal contractors, noting that the proposed pass-through exceeded that interest and was also unconstitutional. The letter is reprinted at App. 215-28.

The water rights fee statutes and implementing regulations allow fees to be passed through to water contractors, but not other fee payors, if the United States refuses to pay its fees. Cal. Water Code § 1560. Accordingly, the State Water Board allocated 100 percent of the United States' unpaid water right fees to the CVP Water Contractors, the entities that contract with the United States for water delivery.

B. Procedural Background

In 2003 and 2004, after SB 1049 was enacted, several water rights fee payors and their membership organizations, including all Petitioners here, brought suit against the State Water Board seeking a writ of mandate and declaratory and injunctive relief. App. 160. The fee payors asserted that the statutes and regulations supporting the State Water Board's new fee structure, on their face and as applied, violated the California and United States Constitutions. App. 112. On April 26, 2005, the California Superior Court ruled in favor of the State Water Board, and the fee payors appealed. App. 161.

In 2007, the Third Appellate District of the California Court of Appeal held that the statutes—California Water Code sections 1540 and 1560—were facially valid, but that the fees as applied through the State Water Board’s regulation—section 1073 of title 23 of the California Code of Regulations—violated the California and United States Constitutions because they passed 100 percent of the United States’ fees to the CVP Water Contractors. App. 185.

On petition for review by both parties, the California Supreme Court analyzed whether the statutes or implementing regulations violated the Supremacy Clause of the United States Constitution. The California Supreme Court held that the statutes were facially constitutional because the United States could resist any charge on sovereign immunity grounds. App. 127. Recognizing that federal law allows taxes on the United States to be passed through to federal contractors, the California Supreme Court stated “[w]hen conducting a supremacy clause analysis, federal courts do not distinguish between fees and taxes.” App. 127 n. 28.

Regarding the fee payors’ as-applied challenge, the California Supreme Court recognized that in “a supremacy clause challenge to a tax on persons or entities that contract with the federal government,” federal case law establishes that “the taxing authority must segregate and tax only the beneficial or possessory interest in the property.” App. 128. However, due to an inadequate factual record, the California Supreme Court could not determine the

CVP Water Contractors' beneficial interest. App. 131. Accordingly, that court remanded the as-applied challenges to the trial court for further factual findings.

On remand, the trial court held a ten-day trial and accepted new evidence to determine, in part, "whether the Water Code amendments, or their implementing regulations, violate the supremacy clause of the United States Constitution by over-assessing the beneficial interests of those who hold contractual rights for delivery of water from the federally administrated Central Valley Project[.]" App. 62. The trial court recognized that in determining the CVP contractors' beneficial interest in the United States' water rights, it also had to consider the system that supports deliveries of the contracted water, not just the face value of contract water. App. 88.

In its ruling on November 12, 2013, the Sacramento County Superior Court found a complete lack of evidence on beneficial interest. The Chief of the Water Rights Division stated that she did not understand the terminology "beneficial interest" in the context of allocating fees, yet recommended passing on 100 percent of the United States' fees to the CVP Water Contractors. App. 85. The court found that the State Water Board's chief expert witness established only that some water could be fairly attributable to the CVP Water Contractors' beneficial interest, but the State Water Board presented no evidence quantifying the CVP Water Contractors' beneficial interest or at all justifying a

100 percent allocation to CVP Water Contractors. App. 88-89. Additionally, the trial court on remand found that the State Water Board testimony lacked credibility because the rationale justifying the 100 percent pass through to CVP Water Contractors emerged only after the fee regulations were enacted and challenged. App. 89-90.

The trial court also noted that the CVP Water Contractors' have no guaranteed right to any water deliveries and that, in any event, the water under the permits was utilized for multiple beneficial federal purposes having nothing to do with the CVP Water Contractors. App. 21. Accordingly, the trial court found the State Water Board's fee allocation to the CVP Water Contractors' to be "unconstitutional under the supremacy clause, because the allocation of fees is not limited to the contractors' beneficial or possessory use of the [United States'] water rights." App. 91.

The State Water Board appealed. On March 2, 2018, the court of appeal overturned the trial court's entire statement of decision. App. 4-6. The court of appeal made its own unsupported factual findings to conclude that the State Water Board considered the CVP Water Contractors' beneficial interest when enacting the fee regulations. The court of appeal found that the State Water Board had limited the pass-through fees to the CVP Water Contractors instead of other federal water projects in California. App. 38-39. The court of appeal cited to the Division Chief's decision to not change her initial recommendation even after receiving comments at

workshops that the State Water Board should not pass through 100 percent of the fees. App. 39. The court of appeal asserted that the plaintiffs would have to show “that they were prejudiced by the [State Water] Board’s actions” in order to invalidate the pass-through fees. App. 40. Ultimately, the court of appeal stated that “[b]ecause the CVP [Water Contractors] received all available water under the [United States] CVP permits and licenses after meeting its legal obligations, the [State Water] Board reasonably valued the contractors’ interest in those permits and licenses at 100 percent.” App. 48.

The water right holders petitioned the California Supreme Court for review, which was summarily denied on May 16, 2018.

REASONS FOR GRANTING THE WRIT

I. A State Cannot Pass Through A Tax On The United States To Federal Contractors Unless The Tax Is Properly Apportioned To The Contractors’ Beneficial Interest

Under the Supremacy Clause, the United States is immune from state taxation absent its consent. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819). “[A] State may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed.” *United States v. Cty. of Fresno*, 429 U.S. 452, 462 (1977). Thus, a federal contractor may be taxed only to the extent of its beneficial or possessory

interest in the United States' property subject to the tax. See *United States v. Hawkins Cty.*, 859 F.2d 20, 23 (6th Cir. 1988) (“That is, a contractor may not be taxed beyond the value of his use.”). As a result, a state tax assessed against a federal contractor as a function of its contract with the United States is an unconstitutional tax, unless it is shown to be proportionate to the federal contractor’s beneficial interest in the property subject to the tax.

This is because “[a] tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the [federal] Government or those with whom it deals.” *United States v. City of Detroit*, 355 U.S. 466, 473 (1958). “[A] State may not single out those who deal with the [federal] Government, in one capacity or another, for a tax burden not imposed on others similarly situated.” *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960).

This Court’s decisions apply this principle in a variety of contexts.

In *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983), this Court held that the state of Tennessee impermissibly discriminated against the United States and those with whom it dealt by assessing a tax against income from federal obligations but not against any comparable state obligation. *Id.* at 398.

In *Phillips Chemical Co.*, 361 U.S. 376 (1960), the state taxed leasehold estates of government lessees at the full value of the property while imposing a lesser burden on similarly situated lessees of state-owned property. *Id.* at 378-79. This Court held the tax to be unconstitutional because it discriminated against the United States' lessees. *Id.* at 379.

Likewise, in *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961), a county attempted to tax the full value of improvements to federal housing leaseholds while taxing other leaseholds at a lower valuation. *Id.* at 748. This Court held the tax was unconstitutional. *Id.* at 752. In cases where a tax is invalid, the tax is void. *Id.* Thus, a tax that discriminates against federal contractors is unconstitutional and void.

II. The State Failed To Apportion Its Water Rights Fee Based On The Federal Contractors' Beneficial Interest, And Instead Passed Through 100 Percent Of The United States Fee Without Apportionment

The CVP Water Contractors' contractual rights account for only 5 percent of United States' water right permits supporting the CVP, they have no guaranteed right of delivery for any amount of water under their contracts, and they often receive far less water than the face amounts of their contracts. Aside from power production, the CVP Water Contractors' deliveries are the last priority when allocating CVP water, and are subservient to priorities for the other federal and state purposes of the CVP, and also to the need for environmental

water required by the Central Valley Project Improvement Act, flow requirements under the federal Endangered Species Act, flow requirements under state water quality regulations, and flood control releases. *California*, 438 U.S. at 651. In some years, some CVP Water Contractors receive no water allocations so that the water can be directed to other federally-authorized CVP purposes.

The California Supreme Court remanded this case for further factual findings to determine the CVP Water Contractors' beneficial interest in the United States' water right permits so that the trial court could determine, under federal law, the amount of water right fees the CVP Water Contractors could be subject to without violating the Supremacy Clause. App. 131. The trial court found that the State Water Board did not present "any evidence that would permit the [c]ourt to determine the contractors' beneficial interests" and that the CVP Water Contractors' beneficial interest in the United States' CVP water rights "could not be valued at 100 [percent]" because they "have no actual guaranteed right to delivery of any amount of water[.]" App. 88-90. The court found that allocating 100 percent of the tax assessed to the United States to the CVP Water Contractors overassessed the water contractors' beneficial interests and was "unconstitutional under the supremacy clause." App. 91.

The decision of the Third District Court of Appeal reversing the trial court's ruling has no basis in law or logic. The State Water Board made no effort at all

to allocate fees based on the CVP Water Contractors' beneficial interests, and assessing 100 percent of the United States' fee to the CVP Water Contractors cannot be justified simply because they received the remaining water after all other authorized purposes and needs for CVP water have been addressed. The proper standard is not whether federal contractors receive 100 percent of a federal agency's property or right *after* the agency satisfies any other obligation including federal purposes having nothing to do with the CVP Water Contractors. Under that approach, a lessee renting 5 percent of a federally-owned building could be responsible for paying all of the city taxes on the building even if the other 95 percent of the building was federally-occupied. Taxes may be passed through the federal government to another payor only if "it is the possession or use . . . that is being taxed." *Cty. of Fresno*, 429 U.S. at 462.

As a result of the State Water Board's unreasonable assessment, the federal CVP Water Contractors were also discriminated against vis-à-vis non-federal entities. The fee structure assessed an annual fee for water right permits and licenses of \$0.03 per acre-foot of water. App. 12. That is the fee paid by all non-federal entities. By comparison, CVP Water Contractors effectively pay a fee of "\$0.37 per acre-foot of the contracted amount." App. 159 (internal quotations omitted). By assessing a higher fee per acre-foot to entities that contract with the

United States, the fee structure discriminates against those who contract for water with the federal government.³

Accordingly, the decision of the court below must be reversed. The State Water Board's fees violate the Supremacy Clause. Thus, the State Water Board's statutes and regulations are unconstitutional and must be voided.

III. This Court Should Reverse The Decision Below And Prevent California, And Potentially Many Other States, From Impermissibly Burdening The United States In Exercising Its Powers Under the Constitution

This case asks the Court to define the extent to which the Supremacy Clause protects federal contractors, or others who deal with the United States, from abusive state taxes disguised as fees. Since *McCulloch v. Maryland*, it has been clear that a state may not tax the United States; nor may it impose a tax in which the legal incidence of the tax falls on the United States. This protection extends to those who contract with the United States. Thus, it is permissible to tax those who contract with the

³ The fee structure is discriminatory also because it allows the fees to be passed through from the United States and tribes to federal CVP Water Contractors, but does not authorize a pass-through between other similarly situated non-federal parties. This type of discriminatory taxation against federal contractors violates the Supremacy Clause. See *Phillips Chemical Co.*, 361 U.S. 376, 383 (1960).

United States, but only to the extent of their beneficial interest in the United States' property, and only so long as the tax does not discriminate against the United States or its contractors or shift a burden onto the United States.

In this case, California has ignored these limits on state action and has taxed the United States' CVP Water Contractors for the full value of the United States' interest in the subject property. The California executive administration and courts have perpetuated and approved a structure that both discriminates and does not limit the tax to the beneficial interest in the property possessed by the CVP Water Contractors. The funding scheme discriminates against the United States' CVP Water Contractors by forcing them to pay over ten times more than others pay and by not charging anything to others who contract with the United States. Under the California courts' application of federal precedent in this case, state governments will easily find justification to pass through any fee imposed on but not paid by the United States on sovereign immunity grounds to local agencies and private citizens that contract with the federal government. California's approach is unconstitutional and must be overturned to prevent states from filling their federally-related funding gaps by passing through all taxes generated by the United States' property to federal contractors.

Distinct from the fee at issue here, CVP water contracts already require CVP Water Contractors to pay a fee for the water they have under their contracts with the United States. This charge includes a cost associated with the capital repayment of the CVP and the cost of operations and maintenance of the CVP. The increased burden imposed by California's unconstitutional action impairs the CVP Water Contractors' ability to pay the United States under the CVP water contracts. It thus impairs the ability of the United States to obtain full repayment of the capital costs of the CVP and to continue to operate and maintain the CVP.

The amount of federal property in California that could fall victim to a tax scheme like the one at issue here is truly vast when one considers the range of federal activities that take place in the nation's largest state. Even more serious, the risk is very real, if the decision here is allowed to stand, that other states may learn from California and pursue a similar course. The most obvious cases for such mimicry probably involve federal lands and water in the West. But the potential for such disruption obviously does not end there. It would open the door for any and every state to address its federally-related funding gaps through unilateral state action and without any action by Congress in clear violation of the precedent set forth by this Court.

CONCLUSION

For the reasons stated above, the Petitioners respectfully request that the Court grant this petition for writ of certiorari.

Respectfully submitted,

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