No. 20-1376

In the Supreme Court of the United States

MICHAEL ABATTI AND MIKE ABATTI FARMS, LLC,

Petitioners,

v.

IMPERIAL IRRIGATION DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

REPLY BRIEF FOR PETITIONERS

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The District does not deny the decision below conflicts with opinions from the Ninth Circuit, the Supreme Court of New Mexico, and the Department of the Interior. Pet. 29-32. It does not contest that, given this conflict, future determinations of Californian landowners' water rights will turn on whether the decisions are made in state or federal court. Pet. 15-16, 29-30. Nor does the District dispute the decision below has slashed the property values of hundreds of thousands of acres of Imperial Valley farmland. Pet. 32.

Instead, the District asserts that the court below correctly applied this Court's decision in *Bryant v. Yellen*, 447 U.S. 352 (1980); the District should not be held to the position it urged in that case; and federal law has no role to play in the distribution of water under projects the federal government funded. BIO 11-16. Those are merits arguments, not reasons to deny certiorari, and they are wrong.

Unable to claim the questions presented are not certworthy, the District contends the Abattis forfeited the argument that their water rights are protected by the Reclamation Act. BIO 17-18. That is also incorrect: the Abattis repeatedly cited and relied on that Act below, and *Bryant* applied that very law. This Court should grant the petition, resolve the conflict in the lower courts, and reaffirm the water rights protected by federal law.

A. The Court of Appeal Misapplied Federal Law in Conflict With Decisions From This Court, Other Authorities, and the District's Own Position in *Bryant*.

The District's primary argument against granting certiorari is that the decision below is correct. The District claims the Abattis' case "is premised on the notion" that *Bryant* held Imperial Valley landowners (1) "have a federally protected right to water from the public irrigation district," and (2) "have a federally protected and irrevocable right to a particular *allocation* of water." BIO 1 (emphasis in original). The District insists *Bryant* "held neither." *Id.* That is a merits argument, not a reason to deny certiorari, and it is in any event wrong.

1. First, the District mischaracterizes the Abattis' arguments. "The Abattis have never argued that they are entitled to a specific quantity of water." Cross-Appellants' Reply Br. 25 (emphasis omitted). On the contrary, the Abattis have consistently asserted that they and other "Imperial Valley farmers have water rights that are appurtenant to their lands and protected under federal law," and the District violated those rights by adopting a distribution plan that allowed water to be transferred to those who lacked rights of their own. Pet. 15; *id.* at 11 (objecting that District's plan "nullified" their water rights and "transferred their rights to other users without compensation"); *accord* Combined Respondents' Br. & Cross-Appellants' Br. 19 ("Combined Br.") ("The trial court correctly held that IID's plan granted distribution priority to persons who do not beneficially own appurtenant water rights, and thereby wrongly

subordinated the interests of Farmers, including the Abattis, that do, thus violating Farmers' appurtenant rights and the 'no injury' rule of water law").

2. In addition, the District misreads *Bryant* when it insists the Court "nowhere suggested … that the landowners themselves had any federally protected 'present perfected rights.'" BIO 7-8, 12. In fact, *Bryant* rejected as "unpersuasive" the Ninth Circuit's conclusion that "the perfected rights in Imperial Valley were owned by and would be adjudicated to the District, not to individual landowners." *Bryant*, 447 U.S. at 369. One of the reasons *Bryant* gave for declining to apply an acreage limitation was that such a restriction would "substantially limit[] … *the rights of[] the farmer-beneficiaries* in the District." *Id.* at 373 (emphasis added). The Court confirmed in an accompanying footnote that "the congressional intention" in passing laws governing the Boulder Canyon Project "was to insure that *persons actually applying water to beneficial use* would not have their uses disturbed by the erection of the dam." *Id.* at 373 & n.24 (emphasis added). The Court reaffirmed that a present perfected water right was acquired "by the actual diversion of a specific quantity of water and its application to a defined area of land." *Id.* at 369-70; *see* Pet. 19. And the Court specifically concluded that any "right" nominally owned by the district was "equitably owned by the beneficiaries to whom the District was obligated to deliver water." *Bryant*, 447 U.S. at 371.

None of that would make any sense if, as the District contends, the "farmer-beneficiaries[']" rights were merely a right to "continued water *service*"—to receive some indeterminate amount of water subject to

change at the District's whim. BIO 14 (emphasis in original). If that were the case, there would have been little any federal project could have done to disturb the farmers' "rights" to begin with, as they would have depended on the District's discretion either way. It would be nonsensical to say the present perfected rights were defined by the actual application of water "to a defined area of land" if those rights did not belong to individual landowners but instead the District as a whole. *Bryant*, 447 U.S. at 369-70. And if the District were correct that the *Bryant* farmers' rights were limited to a "right to service," that would mean the District's rights vis-à-vis the Secretary of the Interior were limited to the same: the Court explicitly recognized the farmers as the "equitable[] own[er]s" of the water rights the District claimed. *Id.*

3. Clearly the District does not believe that is the case. The District cannot deny that in its briefing in *Bryant*, it asserted that "[t]he landowners, as the equitable owners of the present perfected rights, have a constitutionally protected interest therein." *Bryant* Reply 18. The District nonetheless argues it should not be held to that position under the doctrines of issue preclusion and judicial estoppel because (1) the District was actually arguing for the farmers' "right to continued water *service*," not an appurtenant water right, and (2) *Bryant* stated that "it may be true" that "no individual farm in the District has a *permanent* right to any specific proportion of the water held in trust by the District." BIO 14 (quoting 477 U.S. at 369-70) (BIO's emphasis). Neither contention has merit.

First, the briefing in *Bryant* belies the District's current claim that it merely asserted a right to continued service. The District expressly referred to landowners as "equitable owners of the present perfected rights," *Bryant* Reply 18, and equated its own rights with those of the farmers under federal law: "The notion that the District alone is protected against impairment of present perfected rights, and not the landowners who are the equitable owners of those rights under the laws of California, is also in collision with § 8 of the Reclamation Act of 1902[.]" *Bryant* Pet. 17. Furthermore, the District argued that "Section 6 of the Project Act, in requiring the 'satisfaction' of present perfected rights, and Article VIII of the Compact, in providing that present perfected rights are 'unimpaired,' expressly determine … *priority*," that is, who has a superior claim to the water. *Bryant* Reply 17 (emphasis added).

It is irrelevant that *Bryant* expressed some uncertainty regarding whether landowners were entitled to a specific proportion of water. Again, that is not the Abattis' claim. *Supra*, at 2. The Court's equivocation on proportionality does not change its recognition that the water rights before it were "equitably owned by the beneficiaries to whom the District was obligated to deliver water," and "appurtenant to their lands," 477 U.S. at 371 & n.23, just as the District had argued (*see Bryant* Reply 18). The District's contrary arguments in this case should be precluded under the doctrines of issue preclusion and judicial estoppel. Pet. 20-26.

4. Lastly, the District misreads *Bryant* in claiming it "ultimate[ly] h[eld] that federal law *preserves* state

and local discretion over water allocation," and "there is no basis in federal law for the federal government to encroach on the core state function of determining how limited water should be allocated." BIO 16.[1]

Contrary to the District's claims, this Court has ruled that "Congress did not intend to relinquish total control of the actual distribution of the reclamation water to the States." *California v. United States*, 438 U.S. 645, 668 n.21 (1978). The Court has expressly (and repeatedly) "disposed of" "[t]he argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law," and refused to "hold that the Secretary must be bound by state law in disposing of water under the Project Act." *Arizona v. California*, 373 U.S. 546, 586-87 (1963) (citing previous cases). Although present perfected rights must be acquired consistent with state law, *Bryant* confirms that those rights are "defined" by federal rule: the question whether a water right constitutes a protected "present perfected right[] within the meaning of [the Project Act] is obviously one of federal law." 447 U.S. at 364-65, 371 n.22.[2]

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[1] At one point, the District even suggests the Court should deny certiorari because adjudication of the Abattis' rights presents a "pure question of state law." BIO 13. That argument is meritless, which the District ultimately concedes by admitting there is, indeed, a "federal aspect of [the] first question presented": the question whether petitioners "have any federally protected water rights." *Id.* The inexplicable but increasingly popular insistence that federal law has no role to play in determining water rights is a reason to grant certiorari, not to deny it. Pet. 33 (noting similar arguments in other litigation).

[2] The District's reliance on *Ickes v. Fox*, 300 U.S. 82 (1937); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); and *Nevada v.*

The Court could not have reached any other conclusion: the Reclamation Act requires that water rights be "appurtenant to the land irrigated," and provides that "beneficial use" will be "the basis, the measure, and the limit of the right." 43 U.S.C. § 372. The Project Act specifies the three purposes for which the Boulder Canyon dam and reservoir "shall be used." 43 U.S.C. § 617e; *see Bryant*, 447 U.S. at 374 n.26 (rejecting as meritless argument that Act "merely specifies priorities among those entitled to water from the Project and is irrelevant in determining entitlement itself"). This Court should grant the petition and reaffirm the significant role federal law plays in determining water rights under federal projects.

B. The Abattis Did Not Forfeit Their Claim Under the Reclamation Act.

1. Because the court of appeal accepted the District's misreading of *Bryant*, it is unsurprising that its decision is also in conflict with opinions from the Department of the Interior, the New Mexico Supreme Court, and the Ninth Circuit. Pet. 26-32. These sources all recognize that water rights under the Reclamation Act belong to "landowners," not

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United States, 463 U.S. 110 (1983), is misplaced. BIO 19-20. Each of those decisions applied federal law to hold water rights were owned, not by the federal government by virtue of involvement in a reclamation project, but by the *landowners* who put the water to beneficial use. *See Ickes*, 300 U.S. at 95 (water was appropriated for the use of, and became the property of, landowners "under the Reclamation Act"); *Nebraska*, 325 U.S. at 614 (explaining how "[t]he water right is acquired" under "the Reclamation Act"); *Nevada*, 463 U.S. at 123-25 (relying on *Ickes'* and *Nebraska*'s interpretation of Reclamation Act).

irrigation districts or governmental entities. *Id.*; *see*, *e.g.*, *Truckee-Carlson Irrigation Dist. v. Sec'y of the Dep't of the Interior*, 742 F.2d 527, 530 (9th Cir. 1984) (water district "d[id] not directly own any water rights. Rather, the landowners within the service area irrigated by the Newlands Project own water rights").

2. The District does not deny these conflicts, nor does it explain how farmers in California can be expected to plan for the future now that their rights depend on what government decides them. Instead, the District insists that the Abattis forfeited any argument regarding the Reclamation Act. That claim is specious. To begin, the District itself acknowledges several instances in which the Abattis "cited the Act" and the court of appeal discussed the statute in the briefing and opinion below. BIO 17 (citing App. 13a, 14a, 26a, 69a).

The District nonetheless insists the Abattis forfeited the argument because they "omitted [the Act] from [their] argument" below. BIO 17. That is not true. The Abattis argued that they have a water right appurtenant to their land that is protected by a compilation of state and federal laws, including the Reclamation Act, known as "the Law of the River." Combined Br. 17 & n.2 (summary of argument explaining that "federal" "statutes and regulations" are part of the body of law known as "the *Law of the River*" that defines and protects their water rights); *id.* at 21, 45, 47 (arguing District was bound to respect farmers' rights under Law of the River). The first statute the Abattis discussed in their description of the Law of the River was the Reclamation Act. Combined Br. 23; *see* MILTON N. NATHANSON, BUREAU

OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, UPDATING THE HOOVER DAM DOCUMENTS 2 (1978) (cited in Combined Br. 17 n.2) (describing Reclamation Act as part of Law of the River).

The Abattis also argued below that the District itself relied on the Reclamation Act in determining landowners' water rights. In *Bryant*, the District asserted that "each individual landowner has a statutory right" to control his proportionate share of the water rights held in trust by the District, and each landowner's "proportionate share" of those rights was "appurtenant to the land on which the water is used." Combined Br. 55-56 (quoting District briefing). As the Abattis explained below, those arguments "relied upon section 8 of the 1902 [Reclamation] Act," and the *Bryant* "Court agreed with" them in reversing the Ninth Circuit. *Id.* at 56, 57 (quoting the Reclamation Act); *see* Cross-Appellant's Reply Br. 34 (quoting District brief and discussing Reclamation Act); Reply in Support of Pet. for Review 7-8 (same); *see also* Pet. for Review 17-19 (discussing *Bryant*'s application of the Reclamation Act).

3. Regardless how the District mischaracterizes the Abattis' briefing, it is forced to concede that *Bryant* itself applied the Reclamation Act to determine landowners' rights. BIO 5 (admitting *Bryant* "resolved a dispute about the application of two federal statutes to IID. The first of those statues [was] the Reclamation Act"). And there can of course be no question that the correct application of *Bryant* was thoroughly pressed and passed upon below. *See*, *e.g.*, Combined Br. 47-59; App. 13a-14a, 25a-27a, 68a-69a, 110a-112a. The Abattis' contention that they have

water rights protected by the Reclamation Act is not a new claim, or even a new argument in support of their consistent claim to federally protected rights; it is the argument they have made all along, and it is properly before this Court. *Cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Once a federal claim is properly presented, a party can make any argument in support of that claim").

C. The Decision Below Has Already Injured, and Continues to Harm, Imperial Valley Landowners.

The District lastly suggests that review is unwarranted because, it alleges, no farmer has been denied the water needed for his crops. BIO 2, 20. As a result, the District claims, the Abattis' and *Amici*'s descriptions of the agricultural problems created by the decision below are "unfounded and premature." *Id.* at 2. The District is again mistaken.

1. As an initial matter, the District does not deny the harm the decision below has already inflicted. *See* Pet. 32. As the District previously recognized, "the value of the water right … is all that gives worth" to the Valley's desert lands. *Bryant* Reply 9. The court of appeal's ruling that farmers have no such rights damaged the value of hundreds of thousands of acres of land, including that of the Abattis. Pet. 32-33.

2. Next, the District fundamentally misunderstands the agricultural market. It insists that, because farmers have thus far found a way to obtain the water they need despite the District's illegal distribution plan, they have not been harmed by the decision below. BIO 20. But farmers like the Abattis often enter contracts with purchasers guaranteeing delivery

of crops in the future. Brief for California Farm Bureau, *et al.* ("*Amici* Br.") at 9-11; *see* Appellant's Amended Appendix 2217. And as *Amici* explain, Imperial Valley farmers cannot reasonably make the "on-going financial, legal, and contractual obligations" necessary to support *billions* of dollars in agriculture and related businesses when they can no longer predict whether they will receive the water necessary to support their crops. *Amici* Br. 9-10. The uncertainty caused by the decision below will cause "farmers to reduce their investment and future output," *id.* at 12, to the detriment of consumers nationwide, Pet. 32-33.

It is no answer to say, as the District suggests (BIO 21), that farmers should go back to court each year if the District's allocation of water is insufficient. The injury here is not simply the loss of water in one particular year; it is the loss of a water *right* that farmers previously possessed for over one hundred years. That injury is not remedied by annually sending landowners before jurists to plead for something to which they should already be entitled. This Court has recognized that the "[c]ertainty of rights is particularly important with respect to water rights in the Western United States." *Arizona v. California*, 460 U.S. 605, 620 (1983). The Court should grant the petition to put an end to the uncertainty caused by the decision below, address the important issues raised by this case, and reiterate that Western landowners' water rights are protected by federal as well as state law.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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