NO. _____

In the Supreme Court of the United States

CITY OF SANTA MARIA, ET AL.,

Petitioners,

v.

SAN LUIS OBISPO COASTKEEPER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT J. SAPERSTEIN
AMY STEINFELD
BROWNSTEIN HYATT FARBER SCHRECK, LLP
1021 Anacapa Street, 2nd Fl.
Santa Barbara, CA 93101

Counsel for Golden State Water Company

MARIO A. JUAREZ
RICHARD E. ADAM, JR.
JUAREZ, ADAM & FARLEY
625 E. Chapel Street
Santa Barbara, CA 93101

Counsel for Santa Maria Valley Water Conservation District

JEFFREY V. DUNN
Counsel of Record for Petitioners
GREGG W. KETTLES
BEST BEST & KRIEGER LLP
18101 Von Karman Avenue
Suite 1000
Irvine, CA 92612
(949) 263-2600
Jeffrey.Dunn@bbklaw.com

THOMAS T. WATSON
CITY ATTORNEY
CITY OF SANTA MARIA
City Attorney's Office
204 E. Cook Street
Santa Maria, CA 93454

Counsel for City of Santa Maria

APRIL 3, 2023 *COUNSEL FOR PETITIONERS*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

Congress authorized construction of the Twitchell Dam on California's Cuyama River in 1954. Public Law 774 declared the Dam's use to be "irrigation and the conservation of water, flood control, and for other purposes," pursuant to California water law, and in accordance with a 1953 Secretary of the Interior Report. The Secretary's Report stated that the Dam's water was meant to recharge groundwater, and acknowledged this would harm fish migration, but expressly declined to change operating plans to mitigate that harm. The Dam's operation recharges the Santa Maria Groundwater Basin, the principal source of groundwater for over a quarter million residents and businesses, as well as a commercial agriculture industry. In the opinion below, over a vigorous dissent, a two-judge majority Ninth Circuit panel held that the agencies operating the Dam have discretion to divert its water different from the limited Congressional authorized uses, to benefit a fish species' migration.

The questions presented are:

1. Whether the nondelegation doctrine and separation of powers prevent courts from interpreting a federal statute's "and other purposes" clause to invest an agency with unrestricted authority.

2. Whether the Ninth Circuit violated established principles of cooperative federalism when it failed to consider state water law and state water rights in interpreting Public Law 774's authorized use of the water from the Twitchell Dam operations.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows.

Santa Maria Valley Water Conservation District ("District"), Golden State Water Company ("Golden State"), and City of Santa Maria ("City") were appellees below and are petitioners here.

U.S. Department of the Interior, U.S. Bureau of Reclamation, and former Bureau of Reclamation Commissioner Brenda Burman were appellees below and are respondents here.[1]

San Luis Obispo Coastkeeper and Los Padres ForestWatch ("Plaintiffs") were the appellants below and are respondents here.

Pursuant to Supreme Court Rule 29.6, the District and City state that they are governmental entities. Therefore, no corporate disclosure is required.

Pursuant to Supreme Court Rule 29.6, Golden State states that its parent company, American States Water Company, is a publicly-traded company and "Class A" utility regulated by the California Public Utilities Commission. Golden State otherwise has no parent company and no wholly-owned subsidiary or affiliate that has issued shares to the public.

---

[1] The current Bureau of Reclamation Commissioner is Camille Touton.

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 21-55479

San Luis Obispo Coastkeeper; Los Padres ForestWatch, *Plaintiffs-Appellants*, v. Santa Maria Valley Water Conservation District; Santa Maria Valley Water Conservation District Board of Directors; U.S. Department of the Interior; United States Bureau of Reclamation; Brenda Burman, Commissioner of the United States Bureau of Reclamation, *Defendants-Appellees*, and Golden State Water Company; City of Santa Maria, *Intervenor-Defendants-Appellees*.

Date of Final Opinion: September 23, 2022

Date of Rehearing Denial: January 3, 2023

United States District Court for the Central District of California

No. CV-19-08696 (AB (LPRx)

San Luis Obispo Coastkeeper and Los Padres ForestWatch, *Plaintiffs*, v. Santa Maria Valley Water Conservation District, et al., *Defendants*.

Date of Final Order: April 15, 2021

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

RELEVANT STATUTORY PROVISIONS

OTHER DOCUMENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

PETITION FOR WRIT OF CERTIORARI

The District, Golden State, and City respectfully request that this Court issue a writ of certiorari to review the opinion of a split panel of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *San Luis Obispo Coastkeeper v. Santa Maria Valley Conservation District*, 49 F.4th 1242 (9th Cir. 2022), and is reproduced in Petitioners' Appendix (App.) at App.1a–App.50a. The Ninth Circuit's order denying the petition for rehearing appears at App.75a–App.76a.

JURISDICTION

The District Court for the Central District of California had jurisdiction over this action pursuant to 16 U.S.C. § 1540(c), (g) (Endangered Species Act); 28 U.S.C. § 1331 (federal question); and 28 U.S.C. § 1346(a)(2) (action against the United States). The District Court entered summary judgment. A split panel of the Ninth Circuit reversed and remanded in a published opinion on September 23, 2022, and denied rehearing on January 3, 2023. App.75a–App.76a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS AT ISSUE

The relevant statutes and regulations are reproduced at App.77a–App.178a.

STATEMENT OF THE CASE

A. Water is a scarce resource in the West

Water is, and has always been, a scarce and vital natural resource in the West—and California is no different. *See State of California v. United States*, 438 U.S. 645, 653–54 (1978) ("*California*"). This case concerns the stored water from the Twitchell Dam and Reservoir ("Dam")[2] operation in the south-central region of California. The Dam, completed in 1962, is located on the Cuyama River within the Santa Maria Valley Groundwater Basin ("Basin"), about six miles upstream from where the Cuyama and Sisquoc rivers merge to form the Santa Maria River.

As in many parts of the West, the Basin has historically suffered severe groundwater shortages. *City of Santa Maria v. Adam*, 211 Cal.App.4th 266, 276 (2012) ("*Adam*"). "Indeed, the [groundwater] shortage that had begun in the 1930's was severe enough that it literally took an act of Congress (Pub.L. 774) to remedy it." *Id.* at 293; App.220a ("There is immediate

[2] The Dam was formerly referred to as the Vaquero Dam and Reservoir.

need for a water-conservation plan to offset the overdraft on the ground-water reservoir underlying the Santa Maria Valley").

B. Congress authorized construction of the Dam on California's Cuyama River in 1954

1. Public Law 774 authorized Dam construction and its operation for "irrigation and the conservation of water, flood control, and for other purposes," pursuant to California water law, and in accordance with a 1953 Secretary of the Interior Report

Congress passed Public Law 774 ("PL 774") on September 3, 1954 "[t]o authorize the Secretary of the Interior to construct the Santa Maria project," *i.e.*, the Dam. App.77a. The Dam had two purposes: (1) flood control, and (2) to provide "adequate recharge of the now critically depleted groundwater reservoir underlying the Santa Maria Valley." App.208a. The Dam impounds water from the Cuyama River in accordance with Congress' intent that that water percolate directly into the downstream river bed and recharge the Basin's groundwater supply. App.228a (explaining that flows from the Dam would be managed "to obtain the maximum percolation into the groundwater basin").

The central issue in this case is how to interpret the following language in PL 774: "[T]he Secretary of the Interior is hereby authorized to construct the project for irrigation and the conservation of water, flood control, and for other purposes, on Santa Maria River, California, pursuant to the laws of California relating to water and water rights, and, otherwise

substantially in accordance with the recommendations of the Secretary of the Interior dated January 16, 1953." App.77a. Congress instructed that the Dam's operations comply with two substantive directives: (1) the January 16, 1953 "recommendations" of the Secretary of the Interior ("Secretary's Report"), and (2) California state water law.

2. The Secretary's Report stated that the Dam be used to recharge groundwater and acknowledged harm to steelhead populations, but declined to change operating plans to mitigate that harm

The Secretary's Report laid out detailed guidance for the Dam's construction and operations. It allocated costs of the Dam to flood control (approximately $3 million) and water conservation (approximately $14 million), but did not allocate any costs to "other purposes," or to fish and wildlife purposes. App.196a, App.201a. To be clear, "water conservation" as used in PL 774 and the Secretary's Report did not refer to environmental conservation, but rather, to the conservation of water for later human use. App.210a ("The reservoir would detain Cuyama River flows during periods of waste flow to the ocean and subsequently release the conserved water at rates equal to or less than the percolation capacity of Santa Maria River Channel."); *see also* App.224a (noting "the conservation-storage space would be used to recharge the underlying ground-water basin from which the entire valley obtains its water supply").

The Secretary's Report identified other purposes that the Dam was meant to serve that are similar in nature or incidental to irrigation, water conservation,

and flood control. As noted above, the Secretary's Report explained that the Dam's slow release of the Cuyama River's flow was to allow that flow to percolate into the groundwater basin, thereby conserving the released flow so that it could later be pumped from the underground Santa Maria aquifer. App.224a. At that point, the water would be put not only to agricultural use, but also to residential and industrial uses. *Id*.

The Secretary's Report confirmed that the Dam's water conservation purpose was not merely to correct existing groundwater shortages, but also to bring about water percolation sufficient to prevent groundwater shortages in the future, following "anticipated municipal and industrial growth." App.208a.

The Secretary's Report referred to released water from the Dam that entered the Pacific Ocean instead of the Santa Maria aquifer as "waste." *E.g.*, App.210a, App.214a, App.228a. To avoid such waste, the Secretary's Report estimated the "maximum" rate at which water could percolate through the pervious river channel into the aquifer, and planned water releases from the Dam accordingly to secure the "maximum yield from [the project's] reservoir operation." App.228a.

The Secretary's Report considered and rejected operating the Dam to protect Southern Californian steelhead ("steelhead"). App.22a, 239a. "With the project in operation and the flows controlled, water of the Cuyama River," i.e., the water controlled by the Dam, "seldom will reach the ocean." App.239a. "**Steelhead trout will not be able to enter the river as often as without the project** and, as a result, **the project will cause a fishery loss**." App.240a (emphasis added).

Despite acknowledging fishery loss, the Secretary did not modify the plan of development operation, and concluded instead that:

> [W]e do not feel justified in requesting extensive requirements in an attempt to perpetuate the steelhead runs. For example, we will not require a fish ladder at [Twitchell] Dam for passage of migratory fishes. Also, because of the great width and pervious character of the riverbed below the proposed dam, **we do not believe that it would be feasible to request a regular schedule of water releases for maintenance of a stream fishery**.

App.253a (emphasis added).

These considerations were part of the Secretary's Report, and Congress authorized the Dam "substantially in accordance" with that Secretary's Report. Congress was aware that the Dam would adversely impact steelhead, but Congress did not authorize the conservation of steelhead as a project purpose—indeed, it expressly rejected the idea.

C. The Federal Bureau of Reclamation applied for and obtained a permit and a license to appropriate surface water from the State of California

PL 774 mandated that the Dam comply with California water law. In order for the Dam to be constructed "pursuant to the laws of California relating to water and water rights," it first needed a permit to appropriate the surface water from the Cuyama River. Accordingly, the United States Department of the Interior, Bureau of Reclamation ("Bureau") applied

for and received from the State of California[3] a permit, Permit 10271, issued on or about January 4, 1956 ("Permit"), to construct the Dam and appropriate a specified amount of the surface water from the Cuyama River. App.256a–App.261a.

Once the Dam was constructed, it needed a separate license from the State of California to continue operating "pursuant to the laws of California relating to water and water rights." Accordingly, the Bureau applied for and received from the California State Water Resources Control Board ("State Board") a separate license for diversion and use of water, License 10416, issued on or about August 4, 1971 ("License"), to operate the Dam and continue to appropriate a specified amount of surface water from the Cuyama River. App.262a–App.270a.

D. A California Court of Appeals adjudicated rights to the aquifer's groundwater, including to groundwater from the Dam operations

While the Permit and License concern surface water, groundwater is subject to a different legal regime under California law. *Adam*, 211 Cal.App.4th at 278. Water released from the Dam that ends up in the Basin's groundwater supply is subject to adjudication in California state courts "pursuant to the laws of California relating to water and water rights." *See generally id.*

---

[3] The Permit was issued by the State of California – Department of Public Works, Division of Water Resources. As relevant here, the Division of Water Resources subsequently became the State Water Resources Control Board, which State Board later approved the operating License, and which State Board now continues to regulate surface water rights in California.

In 2014, a California state court adjudication of groundwater rights in the Basin, including rights to the Dam's water, was concluded ("Santa Maria Judgment"). App.179a–App.194a. The Santa Maria Judgment established a comprehensive groundwater management regime to protect the long-term integrity of regional groundwater supplies including groundwater recharge from the Dam. *Id.* The case that led to the Santa Maria Judgment was initially filed in 1997, was subsequently consolidated with 13 other cases, proceeded in five phases, was appealed to and remanded by the California Court of Appeals, and took almost 18 years to resolve. *See Adam*, 211 Cal.App.4th at 281–82, 313 (appeal from trial court's original entry of the Santa Maria Judgment); App.182a. The case included literally hundreds of complainants, defendants, and cross-defendants, all of whom claimed, among other things, use of groundwater emanating from the Dam. *Adam*, 211 Cal.App.4th at 280 ("Much of the dispute in this case concerns the Twitchell project."); App.183a–App.184a. The Santa Maria Judgment establishes rights to use Basin groundwater, including water from the Dam operations. *Adam*, 211 Cal.App.4th at 276, 283–84.

Plaintiffs did not intervene in the Santa Maria Judgment.

E. The Dam continues to contribute to the region's groundwater supply, serving the purpose mandated by Congress more than half a century ago

Today, drought and water shortages remain common in California—and in the Basin. *See Adam*, 211 Cal.App.4th at 276. Congress intended the Dam to mitigate droughts and water shortages by allowing

water from the Cuyama River to percolate into the soil and, from there, directly into the underground Santa Maria aquifer. Indeed, the Dam has played a vital role in relieving the historical water shortages of the region. *Id.* at 281. After several decades of the Dam's operations, the Basin achieved a groundwater "equilibrium" by the late 1990s. *Id.*

There is a "concern that aging reclamation facilities and growing population could lead to more [water] shortages in the future." *Adam*, 211 Cal.App. 4th at 276. "Urban population was growing. Over-pumping had continued . . . And the Twitchell Reservoir has been accumulating silt, which reduces its capacity and threatens to diminish its ability to augment natural recharge." *Id.* at 281. There remains a "reasonable certainty" that the Basin "will suffer water shortages in the future" without the Dam's continued successful operations of replenishing the groundwater supplies. *Id.* at 284.

F. Plaintiffs claim that the Dam's operations interfere with steelhead reproductive migration in violation of the Endangered Species Act

1. The District Court granted summary judgment in favor of the defendants, finding that PL 774 did not provide the Agencies with discretion to operate the Dam to facilitate steelhead migration

Years after the rights to the Dam's water had been adjudicated under California state water law, Plaintiffs filed this case. Plaintiffs initially brought this action on October 9, 2019, against the District, the District Board of Directors, the U.S. Department

of the Interior, the Bureau, and Bureau Commissioner Brenda Burman (collectively, "Agencies"). Plaintiffs claimed for the first time that the Agencies' operation of the Dam interfered with steelhead reproductive migration, which Plaintiffs alleged is an unlawful take under the Endangered Species Act ("ESA").

The Dam is a federally funded and federally owned project. The Bureau coordinates operations with the District and the Army Corps of Engineers to release water from the Dam to augment Basin recharge. The City and Golden State pump groundwater for municipal and industrial use by their residents, businesses, and customers. The Santa Maria Judgment allocates a portion of the groundwater from Dam operations to the City and Golden State. The District Court granted the City and Golden State's joint motion to intervene.

At issue in the case was whether PL 774 permits Agencies discretion to consider the ESA when operating the Dam. The Agencies, joined by the City and Golden State, moved for summary judgment on numerous grounds, including that PL 774 mandates operation of the Dam for the discrete purposes of irrigation, conservation, and flood control; PL 774 affords the Agencies no discretion to release any amount of Dam water to preserve steelhead migration; and thus the Agencies could not be liable for take under the ESA.

The District Court granted summary judgment based on the foregoing, and declined to rule on any remaining arguments. App.51a–App.74a.

2. A divided panel of the Ninth Circuit reversed

Plaintiffs appealed. A split panel of the Ninth Circuit issued a published opinion reversing and remanding ("Opinion"). App.1a–App.50a. The panel majority held that PL 774 affords the Agencies discretion to operate the Dam for purposes other than irrigation, conservation, and flood control—including, potentially, to preserve steelhead. App.7a. The majority reasoned that PL 774's authorization that the Dam be operated for "other purposes" in addition to Congress' enumerated purposes of "irrigation and the conservation of water, [and] flood control" reflects congressional intent to grant the Agencies discretion to operate the Dam for a broad variety of purposes. App.12a–App.13a. These purposes include, as the majority put it, "to accommodate changed circumstances such as the enactment of new statutes," such as the ESA. App.12a.

The majority of the panel recognized that PL 774 further requires that the Agencies operate the Dam "otherwise substantially in accordance with" the Secretary's Report. App.9a. In order to avoid a take of steelhead, the majority opined that the Dam's flow rate would have to deviate only slightly from the Secretary's recommended flow rate, and is within the discretion afforded the Agencies by the statutory requirement of "substantial compliance." App.13a. The panel majority held that it must give effect to both PL 774 and the ESA. App.13a–App.18a. The panel majority declined to apply the principle of *ejusdem generis* to interpret PL 774's use of the phrase "other purposes," because it viewed the language of PL 774 to be clear. App.18a–App.19a.

Regarding the nondelegation doctrine, the panel majority ruled that it did not apply. App.19a, n.3. The panel majority stated that this Court has consistently upheld Congress' ability to delegate power under broad standards, and that Congress had provided sufficient guidance to the Agencies in PL 774. *Id*. The panel majority reversed the District Court's order granting summary judgment.

Judge Bea dissented. App.21a–App.50a. Judge Bea found that the Secretary's Report shows the Dam was intended to conserve all captured water from the Cuyama River in order to percolate that water into the Santa Maria aquifer. App.21a–App.22a, App.26a–App.27a. No water was to flow into the ocean. *Id*. The Secretary's Report specifically considered the negative impacts Dam operations would have on steelhead runs from the ocean up river, and declined to do anything about them. App.21a–App.22a, App.27a–App.31a.

Judge Bea found that PL 774's "other purposes" clause should be interpreted more narrowly following the principle of *ejusdem generis*, and that PL 774's "substantial compliance" language could not be read to authorize the Agencies to ignore the Secretary's Report. App.33a–App.42a.

Judge Bea also found that the panel majority's interpretation of PL 774 violated the nondelegation doctrine. App.42a–App.45a. The panel majority's interpretation of "other purposes" in PL 774 "apparently means any purpose whatsoever." App.43a. "The majority's reading obliterates from the text any 'intelligible principle' that would make PL 774 a permissible delegation of authority from Congress to the Defendant agencies concerning the Dam's operation by articulating 'the general policy [Defendant agencies]

must pursue and the boundaries of [their] authority.'" *Id.* (alterations in original).

The majority further failed to address the authoritative role that California water law plays in the Dam's operation, which role was expressly mandated by PL 774. *See* App.9a.

Petitioners petitioned the Ninth Circuit for rehearing *en banc*, which was denied on January 3, 2023. App.75a–App.76a.

Petitioners now respectfully ask this Court to issue a writ of certiorari to provide much-needed direction on the important questions of federal law described below.

REASONS FOR ISSUING THE WRIT

This Petition presents issues of complexity and divisiveness, as demonstrated in the stark contrast between the decisions of the District Court and the Ninth Circuit panel's dissent, on the one hand, and the majority, on the other. *Compare* App.21a–App.74a *with* App.7a–App.20a. The extent and scope of disagreement between reasonable and intelligent jurists demonstrates that the issues presented here are subject to multiple interpretations, which call for this Court to resolve. This Petition raises important questions about the proper interpretation of statutes in light of separation of powers principles as expressed by the nondelegation doctrine and other statutory interpretation canons. This Petition also raises important questions about the balance of power established in our system of cooperative federalism, and the importance

of giving power and meaning to express Congressional deference to state law, which deference has provided (and should continue to provide) reliability to the States in the governing of their intrastate water supplies to protect the health, safety, and livelihoods of their citizens.

A. The Ninth Circuit majority's refusal to use the nondelegation doctrine to interpret an Act of Congress to avoid investing an agency with unrestricted authority raises a question of federal law that this Court should settle

1. The nondelegation doctrine prevents agencies from being invested with unrestricted authority in violation of separation of powers

The Ninth Circuit majority rejected the idea that the nondelegation doctrine was implicated in its interpretation of PL 774's "other purposes" clause vesting the Agencies with essentially unfettered discretion to operate the Dam in ways contradictory to the Secretary's Report, incorporated by reference into PL 774. There is nothing in this Court's nonconstitutional delegation of powers decisions that compels this conclusion, and the Court's jurisprudence on that subject suggests the Ninth Circuit majority erred. This Court should revisit the nondelegation doctrine and correct the error. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 486–87 (2001) ("*Whitman*") (Thomas, J., concurring).

The nondelegation doctrine is founded upon the fundamental concept of separation of powers—the legislative branch of government cannot completely abdicate its lawmaking function and delegate that

authority to the executive branch. The nondelegation doctrine requires a legislature delegating authority to "lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform." *Whitman*, 531 U.S. at 472 (2001) (alteration, quotation marks, and citation omitted). The legislature must make clear the "general policy" to be pursued and "the boundaries of this delegated authority." *Am. Power & Light Co. v. Sec. & Exch. Comm'n*, 329 U.S. 90, 105 (1946).

The typical nondelegation case deals with a situation where a statute facially grants (arguably) unrestricted authority to an agency, or where the agency advances an interpretation that would have that effect. *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 535, 541–42 (1935) ("*A.L.A. Schechter Poultry*") (National Industrial Recovery Act's authorization that the President make "codes of fair competition" without any standards aside from the Act's statement of the general aims of rehabilitation, correction, and expansion of industry, impermissibly delegated Congress' legislative authority); *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 420–30 (1935) ("*Panama Refining*") (National Industrial Recovery Act's attempt to authorize the President to prohibit transportation of petroleum produced or withdrawn from storage in excess of the amount permitted by state law impermissibly delegated Congress' legislative authority).

It has been more than eighty years since the Supreme Court has held a statute to violate the nondelegation doctrine. *United States v. Melgar-Diaz*, 2 F.4th 1263, 1266–67 (9th Cir. 2021), *cert. denied*, 142 S.Ct. 813 (2022). Yet nondelegation challenges continue

to be raised and evaluated in the lower federal courts. *E.g., id.* (rejecting argument that illegal entry statute, 8 U.S.C. § 1325(a)(1), violates the nondelegation doctrine). One federal court of appeals recently overturned legislation for violating the nondelegation doctrine. *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 462 (5th Cir. 2022) (Congress' delegation of authority to the Securities and Exchange Commission to decide whether to prosecute securities law violations within the agency or in an Article III court violates the nondelegation doctrine).

Courts have also referenced the nondelegation doctrine as an aid to statutory interpretation, even though more than forty years have passed since a plurality of this Court has relied on the doctrine to support its interpretation of a statute. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 642, 646 (1980) ("*Benzene*") (Stevens, J., plurality). In *Benzene*, a plurality of the Court held that a new health standard promulgated by the Occupational Safety and Health Administration limiting occupational exposure to benzene was unenforceable because the standard was not supported by appropriate findings. *Id.* at 662. In his plurality opinion, Justice Stevens rejected the interpretation of the Occupational Safety and Health Act argued by the government on appeal. *Id.* at 646.

> If the Government was correct in arguing that neither § 3(8) nor § 6(b)(5) requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a "sweeping delegation of legislative power"

> that it might be unconstitutional under the Court's reasoning in *A.L.A. Schechter Poultry* [], and *Panama Refining* []. A construction of the statute that avoids this kind of open-ended grant should certainly be avoided.

Id. (citations omitted).

The *Benzene* plurality opinion has been criticized as offering insufficient guidance on the contours of the nondelegation doctrine. *Am. Trucking Ass'ns, Inc. v. United States E.P.A.*, 195 F.3d 4, 14 (D.C. Cir. 1999) (Silberman, J., dissenting) ("the boundaries limiting the scope of congressional delegation to the executive branch remain only dimly perceivable"), *reversed sub nom. Whitman,* 531 U.S. 457 (2001). The Ninth Circuit and the other lower federal courts have sometimes struggled applying the nondelegation doctrine in statutory interpretation. *E.g.*, App.19a, n. 3 (Maj. Op.) ("The dissent mistakenly argues that this interpretation of PL 774 violates the non-delegation doctrine."); *Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 672 (6th Cir. 2021) (government's interpretation of Center for Disease Control's authority under the Public Health Service Act "could raise a nondelegation problem"); *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 611 (5th Cir. 2021) (Occupational Safety and Health Act was not, and likely could not be, under the Commerce Clause and nondelegation doctrine, intended to authorize a workplace safety administration "to make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways").

This case allows the Court to revisit the nondelegation doctrine, as also demonstrated by the fact

that the Ninth Circuit judges who decided this case have strenuously disagreed. The central issue in the case is how to interpret the following language in PL 774: "[T]he Secretary of the Interior is hereby authorized to construct the project for irrigation and the conservation of water, flood control, and for other purposes, on Santa Maria River, California, pursuant to the laws of California relating to water and water rights, and, otherwise substantially in accordance with the recommendations of the Secretary of the Interior dated January 16, 1953." App.77a. PL 774's residual clause—"and for other purposes"—is subject to conflicting interpretations, as evidenced by the stark contrast between the decisions of the District Court and the panel dissent, on the one hand, and the majority, on the other. *Compare* App.21a–App.74a *with* App.7a–App.20a.

The suitability of this case for revisiting the nondelegation doctrine is further demonstrated by the fact that the parties seeking an expansive delegation of authority are not, in fact, the agency itself, but rather third parties seeking to use the agency as a means to secure their own ends. If the nondelegation doctrine retains any vitality, then it must aid an agency's interpretation of the extent of its discretion when exhorted by a third party to expand that discretion. Congress weighed protecting fish against conserving water for people. Congress decided against protecting fish and in favor of serving people's needs when it approved Dam construction and incorporated the Secretary's Report by reference in PL 774. Contrary to the assertion of the majority Opinion, the nondelegation doctrine should be applied here, where an agency seeks to eschew an interpretation that would

require the agency to weigh policymaking decisions that were considered and rejected by Congress in initially authorizing the agency's action.

2. The Ninth Circuit majority's interpretation of PL 774 violates the reference canon, the principle of *ejusdem generis*, and nondelegation doctrine

The nondelegation doctrine is not the only principle of this Court's jurisprudence that the Ninth Circuit's majority panel misapplied in interpreting PL 774. The panel majority also misapplied the reference canon and the principle of *ejusdem generis*.

a) The panel majority misapplied the reference canon

The appellate majority adopted an expansive view of PL 774, imposing upon the Agencies the discretion to operate the Dam to support steelhead populations. App.19a. The majority interpreted PL 774's "express terms" to authorize Agencies "to operate Twitchell Dam for other purposes besides irrigation, conservation, and flood control—including, potentially, adjusting water discharges to support the migration and reproduction of Southern California Steelhead." *Id.*

The majority reached this conclusion despite the language of PL 774 itself and the Secretary's Report. In so doing, the majority ignored the reference canon of statutory interpretation. This Court has repeatedly held that a statute's reference to some other authority incorporates that other authority as though copied and pasted at the time of the incorporating statute's adoption. *See, e.g.*, *Hasset v. Welch*, 303 U.S. 303, 314–

15 (1938); *Jam v. Int'l Fin. Corp.*, 139 S.Ct. 759, 769 (2019). As indicated by Judge Bea's dissent, the Secretary's Report expressly considered and rejected operating the Dam to protect steelhead. *See generally* App.21a–App.50a.

b) The majority declined to apply the principle of *ejusdem generis*

The panel majority declined to apply the principle of *ejusdem generis*. This Court has repeatedly held that where a statute's "residual clause" is open to uncertainty, it should be interpreted as limited by the specific terms that precede it. *See Yates v. United States*, 574 U.S. 528, 545–46 (2015); *King v. Burwell*, 576 U.S. 473, 497–98 (2015); *Wash. State Dept. of Social & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 383–84 (2003); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001). The majority inflated the scope of PL 774, calling the "other purposes" residual clause "expansive language reflect[ing] a congressional intent to grant the Agencies discretion to operate the dam for a variety of purposes, including to accommodate changed circumstances such as the enactment of new statutes." App.12a.

The unstated "variety of purposes" the Ninth Circuit envisions for the Dam transforms the Agencies' decades-old operations and enables a potential litigant (such as Plaintiffs) to adopt the role of policymaker, exhorting the Agencies to engage in *ad hoc* decision-making as to whether any future proposed use of water constitutes an authorized "other purpose" within the Ninth Circuit's "expansive" interpretation of PL 774. The dissent recognized the unusual posture of this matter, noting "this case differs from cases in which

a federal agency itself argues for a more expansive view of its own statutory discretion." App.23a, n. 2.

PL 774 is not the only statute of its kind to employ a residual clause; if the Ninth Circuit's Opinion is allowed to stand, any number of federal statutes and regulations could be expanded on an *ad hoc* basis as plaintiffs, acting as would-be legislators, bring suit in order to compel agencies to expand their understanding of their own federally authorized duties.

c) The panel majority interpreted the Agencies' discretion in violation of the nondelegation doctrine

The panel majority rejected out of hand the dissent's invocation of the nondelegation doctrine, finding that, "[i]n light of the Supreme Court's approval of these broad delegations of authority, Congress clearly provided sufficient guidance to the Agencies in PL 774." App.19a, n. 3. The panel majority read PL 774's residual "other purposes" clause to give the Agencies discretion to operate the Dam to assist the migration of steelhead. App.19a. The panel majority did so even though this would interfere with PL 774's stated purpose of "conservation of water." App.77a. The panel majority did so even though the Secretary's Report, which PL 774 incorporates, considered and rejected operating the Dam to assist steelhead migration. App.253a. As explained by Judge Bea's dissent, the majority's reading of "other purposes" in PL 774 means "any purpose whatsoever." App.43a. This "obliterates from the text any 'intelligible principle' that would make PL 774 a permissible delegation of authority from Congress to the Defendant agencies." *Id.*

The nondelegation doctrine requires that PL 774 be read to constrain the Agencies from operating the Dam to assist steelhead migration. Judge Bea's dissent states that: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." App.44a (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988)). PL 774 can and should be interpreted to limit the Agencies' discretion.

The nondelegation doctrine invalidates the panel majority's construction of PL 774. *See* App.44a (Diss. Op. of J. Bea) (citing *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) ("A construction of [a] statute that avoids" a "'sweeping delegation of legislative power' that . . . might be unconstitutional under [the nondelegation doctrine] . . . should certainly be favored." (Citation omitted.)) and *Reynolds v. United States*, 565 U.S. 432, 450 (2012) (Scalia, J., dissenting) (arguing that one reason in favor of a construction of a statute is that it avoids "sailing close to the wind with regard to the principle that legislative powers are nondelegable")).

The panel majority's reasoning could allow other courts interpreting "other purposes" and similar residual clause language in other statutes to eliminate an "intelligible principle" to limit agency action.

The panel majority's interpretation is particularly problematic where, as here, the federal agency interpreted its own authority more narrowly. This Court could make clear that the nondelegation doctrine may be invoked by an agency to *defend* itself from a

third party's attempt to interpret agency authority more broadly. The panel majority allows parties to insert themselves decades after the fact into Congress' delegation, and to seek to expand an agency's understanding of its own authority in order to accommodate a third party's interest. To allow third parties to usurp executive branch agencies in this way is to ignore separation of powers principles. The nondelegation doctrine was conceived by this Court to guard separation of powers. The nondelegation doctrine should be applied here to interpret PL 774 to limit agency discretion and hold that the Agencies do not have discretion to operate the Dam to assist steelhead migration.

B. The Ninth Circuit majority's Opinion conflicts with established principles of cooperative federalism and a history of Congressional deference to state authority over intrastate water

The majority ignores the complex and established framework of California water law that governs the Dam's water, and, contrary to Congressional intent, mistakenly renders that framework irrelevant. California water law has a much larger role here than the Ninth Circuit acknowledged, much less addressed.

1. Congress defers to state water law

The Supreme Court last provided direct guidance on the authority of state law over intrastate water subject to federal reclamation projects over four decades ago. In a 6-3 opinion delivered by Justice Rehnquist, this Court found that "[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western

States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *California*, 438 U.S. at 653; *see also United States v. New Mexico*, 438 U.S. 696, 702 (1978) ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.").

At issue in *California* was Section 8 of the Reclamation Act of 1902, which provided that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation." *California*, 438 U.S. at 645. Similarly, PL 774 requires that the Dam be operated "pursuant to the laws of California relating to water and water rights." App.77a. *California* interpreted the language of Section 8 as clear Congressional deference to state water law; so too has Congress under PL 774 "clearly provided that state water law would control in the appropriation and later distribution of the water." *California*, 438 U.S. at 664; *see also Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945) (noting "a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water"). Therefore, the *California* decision holds that California state water law govern the rights to the Dam's water.

Since the *California* decision, courts have reiterated and reinforced this purposeful accommodation of state law authority over intrastate water. *See, e.g.*, *United States v. State of Cal., State Water Res. Control Bd.*, 694 F.2d 1171, 1177 (9th Cir. 1982) ("*State Board*"); *see also Ray v. Atlantic Richfield Co.*, 435 U.S.

151, 157 (1978) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (Citations and quotations omitted.)).

For example, in *State Board* (which was also decided over four decades ago), the Ninth Circuit applied this Court's guiding principles from *California* to conclude that "a state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme." *State Board*, 694 F.2d at 1177. *State Board* upheld "California's restrictions on [the Bureau's] appropriation of water for power generation" at the New Melones Dam on the Stanislaus River in California. *Id.* at 1179. *State Board* reasoned that *California* reinforced the core principles of cooperative federalism when assessing the role of state water law on a federal project over intrastate water. *Id.* at 1178 ("The precepts of federalism, if followed, should produce mutual respect and accommodation for state interests. The congressional scheme and the Supreme Court's earlier decision in this case make it clear that such precepts are to be carefully observed here."). Therefore, "[t]he United States may not justify its demands simply as a raw exercise of superior authority. It may not be indifferent to state interests affected by the operation of an intrastate reclamation project." *Id.* A state "may impose conditions upon the United States' appropriation of water, so long as the condition 'actually imposed' is not inconsistent with other Congressional directives." *Nat.*

Res. Defense Council v. Kempthorne, 621 F.Supp.2d 954, 990 (E.D. Cal. 2009) (quoting *California*, 438 U.S. at 679).

Subsequent case law throughout the West has continually upheld these fundamental principles of cooperative federalism, which require that the federal government—specifically, the Bureau—appropriate water with deference to and "within the purview of state laws." *Nat. Res. Defense Council v. Patterson*, 791 F.Supp. 1425, 1435 (E.D. Cal. 1992); *see also, e.g.*, *Strawberry Water Users Ass'n v. United States*, 576 F.3d 1133, 1148 (10th Cir. 2009) (noting the "general rule" is that state water law decides the control, appropriation, use, and distribution of reclamation of water); *South Delta Water Agency v. United States Dep't of Interior, Bureau of Reclamation*, 767 F.2d 531, 536–38 (9th Cir. 1985) (finding that the Bureau of Reclamation must comply with state law in their operation of and acquisition of water for the Central Valley Project); *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir. 1983) (noting that fundamental principles of federalism require the national government to weigh state substantive law).

2. The Dam was constructed and continues to be operated pursuant to California water law, consistent with clear and express Congressional intent

Appropriately, and accordingly, PL 774—the Dam's founding legislation—required that the Bureau construct and operate the Dam "pursuant to the laws of California relating to water and water rights." App.77a. California law governs the Dam's water.

In California, the state Constitution and state policy mandate that water be utilized for beneficial purposes to the fullest extent to which the supplies are capable, and that waste be prevented. Cal. Const., art. X, § 2. This water policy in California is enshrined in the state's very Constitution. *Id.*

The appropriation of surface water rights is typically governed by and requires approval from the State Board. *Adam*, 211 Cal.App.4th at 281 ("Because river water is surface water, the Bureau of Reclamation had to obtain a license from the [State Board] to appropriate the seasonal flows of the Cuyama River."). Alternatively, the allocation of groundwater rights in California is frequently left to adjudication by the courts, as it was for the Basin and water from Dam operations here. *See id.*; *see also* App.179a–App.194a. In all, both the surface water and the groundwater relating to the Dam's operations have been appropriated, allocated, or adjudicated in accordance with California state law.

a) The Dam's construction and corresponding surface water rights were appropriated pursuant to California law

PL 774 required the Bureau to obtain a permit to appropriate water from the Cuyama River and operate the Dam. App.77a, App.256a–App.261a; *see California*, 438 U.S. at 652 ("The United States Bureau of Reclamation, as it has with every other federal reclamation project, applied for a permit from the appropriate state agency, here the California State Water Resources Control Board, to appropriate the water that would be impounded by the Dam and

later used for reclamation."). The Bureau acquired the Permit before it even started Dam construction. App.261a (dated January 4, 1956); *see also Adam*, 211 Cal.App.4th at 309 (noting that "the Bureau of Reclamation would not begin construction until and unless water rights *for project purposes satisfactory to the Secretary* of the Interior have been acquired or assured" (quotation marks omitted) (emphasis in original)). The Permit limited the "amount of water appropriated" by the Bureau to 214,000 acre-feet (AF) per annum, and reserved the right to reduce that amount further in the Dam's subsequent operating license. App.258a, § 2.

Following construction, the Dam was operated pursuant to the License. S*ee California Trout, Inc. v. Fed. Energy Regul. Comm'n*, 313 F.3d 1131, 1137 (9th Cir. 2002) ("We think that when Congress required applicants for a license to provide a State certification, it intended to give States control . . . "). The License imposed further limits on the Dam's "right to the use of the water of Cuyama River" under California law. App.269a ("All licenses shall be under the terms and conditions of this division (of the Water Code)." (Citing Cal. Water Code § 1626.)). This included further limiting "the amount of water to which this right is entitled and hereby confirmed is **limited to the amount actually beneficially used for the stated purposes** and shall not exceed one hundred sixty-five thousand eight hundred (165,800) acre-feet per annum, to be collected from October 1 of each year to June 30 of each succeeding year." App.266a–App.267a (emphasis added). The License further identified those "stated purposes" as "recreational use at Twitchell Reservoir; domestic, municipal, industrial, salinity

control, and irrigation," without a corresponding residual clause. App.267a. The License made no reference to steelhead. Consistent with the Secretary's Report and PL 774, the License did not allow the Dam to be operated in a way that considers steelhead migration habits.

The state-law limitations upon the Dam as set forth in the Permit and License are valid because they are consistent with PL 774's clear instruction to operate the Dam for irrigation, conservation, and flood control purposes. The Permit and License do not "clash[] with express or clearly implied congressional intent" present in PL 774, and do not work "at cross-purposes with an important federal interest served by the congressional scheme"—indeed, they reinforce the Congressional intent stated in PL 774 that steelhead are not a purpose to be considered in the Dam's operation. *State Board*, 694 F.2d at 1177. For any question concerning the use and appropriation of the Dam's water, the Ninth Circuit should have deferred to the state water rights allocated under California law that are consistent with PL 774—including the Permit and License. *See Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 959 (1982) ("[Q]uestions of water rights that arise in relation to a federal project are to be determined in accordance with state law.").

b) The Dam's replenishment of Basin groundwater and corresponding groundwater rights were adjudicated pursuant to California law

As noted above, under California law, groundwater is subject to a different legal regime than surface water. Because the Dam was built to supplement groundwater

in the area, the Dam's groundwater was allocated under California law as part of a groundwater rights adjudication.

The Santa Maria Judgment was finalized in 2014. App.179a. Pursuant to California law, it sets forth the rights to and use of groundwater in the Basin, including the water derived from the Dam. App.180a; *Adam*, 211 Cal.App.4th at 276, 285. The Santa Maria Judgment includes the Stipulation, which was first agreed upon in 2005, and, after being challenged, was ultimately fully and finally approved in 2014. App. 180a–App.181a; *see also Adam*, 211 Cal.App.4th at 276 ("The Stipulation contains a plan, referred to as a physical solution, which resolves conflicting water rights claims and allocates the various components of the groundwater (native groundwater, return flows of imported water, and salvaged water) among the stipulating parties."). The Santa Maria Judgment allocated the water rights "to any portion of that increment of augmented groundwater supply within the Basin that derives from the Twitchell Project's operation." *Adam*, 211 Cal.App.4th at 285.

The Santa Maria Judgment makes clear that the Dam must operate to "[m]aximize recharge" of the area's groundwater and consistent with "the requirements of the Bureau." App.190a. Groundwater recharge is paramount. As noted above, the unique purpose for the Dam was to provide water for underground storage and remedy historical shortages. App.9a (Maj. Op.) ("The water is then released from behind the dam during dry periods at a rate designed to maximize percolation into the dry riverbed and recharge the groundwater basin."). The Santa Maria Judgment, accordingly, was entered by the California

courts pursuant to California state water law to ensure the Dam continues to provide groundwater recharge in the Basin.

Specifically, the Santa Maria Judgment allocated eighty percent of the Dam's water (referred to as "Twitchell Yield") to the City of Santa Mara, Southern California Water Company, and City of Guadalupe, and the remaining twenty percent to "Overlying Owners," that is, owners of land overlying the Basin who hold an appurtenant right to use groundwater for overlying, reasonable, and beneficial use. App.186a, § V(A)(3)(b)(ii). The eighty percent was further divided as between the City of Santa Maria, Southern California Water Company, and City of Guadalupe. *Id.*

The Santa Maria Judgment also delineates whether rights to the Dam's water can be transferred (they can be, but "only between Stipulating Parties" following a "memorandum of agreement" that "shall be filed with the Court") and whether unused portions of the allocations can "carryover" to a following year. App.187a, § V(A)(3)(b)(iv), (v). The Santa Maria Judgment further organized the "Twitchell Management Authority," or "TMA," which permitted "[o]nly those parties holding an allocation of Twitchell Yield [to] be voting members of the TMA." App.193a, § V (D)(4). The TMA was required to divide the cost of project improvements and certain "extraordinary" operations "among Twitchell Participants on the same basis as the allocation of their Twitchell Yield"—that is, the cost to maintain the Dam was proportionally divided pursuant to the benefit of the water received. App.193a, § V (D)(4)(h).

The Santa Maria Judgment is comprehensive and clear in its adjudication of the rights to the

groundwater from the Dam. It was approved by California courts after nearly two decades of litigation, and binds hundreds of parties to the rights adjudicated therein. The Santa Maria Judgment provides certainty for water uses and enhances the reliability of the Basin's groundwater supply. Importantly, there is no part of the Stipulation and no part of the Santa Maria Judgment that address steelhead. Instead, the Dam's "salvaged water"—water that "would have wasted to the sea during the rainy season but for the dams and reservoirs that capture and save it"—was a primary subject of the Santa Maria Judgment and was accordingly allocated for human uses. *Adam*, 211 Cal.App.4th at 280.

The Santa Maria Judgment intended to provide full guidance and finality to those parties seeking rights related to the Dam's groundwater in the Basin. Any alteration to the Santa Maria Judgment would impact the established water rights of hundreds of nonparties, and would fundamentally change, reduce, or extinguish those rights adjudicated according to California water law. The Ninth Circuit panel majority ignored this and instead granted permission to two non-parties to the Santa Maria Judgment to come in and threaten these settled rights.

c) The Ninth Circuit's willingness to create a new federal requirement violates the Court's precedent

The Permit, License, and Santa Maria Judgment result from comprehensive state-law processes that are consistent with PL 774 and also consistent with the tenets of cooperative federalism established in *California*. The Ninth Circuit did not address the

importance of state law here, including the Dam's operating requirements to comply with (a) the Permit and License appropriating surface water rights, as consistent with PL 774, and (b) the Santa Maria Judgment allocating Basin groundwater rights, as consistent with PL 774. The Ninth Circuit has rendered governing California law a nullity. *See California*, 438 U.S. at 675 ("Congress intended to defer to the substance, as well as the form, of state water law.").

This Court has recognized the complex history and unique purpose of Congressional deference to state water law. *California*, 438 U.S. at 653. Deference to state water law in the context of intrastate water is vital to the ability of Western States to continue providing water for the health and safety needs of their citizens as the risks of climate change, drought, and water shortages continue.

This Court has previously corrected the Ninth Circuit's interpretation of the ESA's scope. *See Nat'l Ass'n of Home Builders v. Def. of Wildlife*, 551 U.S. 644, 664 (2007) ("*Home Builders*"). Sixteen years ago, in *Home Builders*, this Court concluded that "reading [the ESA] for all that it might be worth runs foursquare into our presumption against implied repeals" and therefore declined to "construe[] [the ESA] as broadly as the Ninth Circuit did below." *Id.* at 664, 647.

The same is true here. "While a later enacted statute (such as the ESA) can sometimes operate to amend or even repeal an earlier statutory provision," such as PL 774, "'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *Home Builders*, 551 U.S. at 662 (alteration in original) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)).

There are no repeals by implication here, for "a statute dealing with a narrow, precise, and specific subject," such as PL 774's narrow application to the Dam, "is not submerged by a later enacted statute covering a more generalized spectrum," such as the ESA. *Id.* at 663 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)). PL 774 is the Dam's enacting legislation—it prescribes the Dam's purposes. Conversely, the ESA is a statute of generalized application that does not impliedly repeal PL 774's clear direction (pursuant to which California state water law has established a vested system of rights to the Dam's water).

Plaintiffs should not be provided the opportunity on remand to argue that the ESA can displace Congressional directives and authorize new Dam operations. Indeed, other circuits have similarly held that the ESA cannot expand the authorizing powers of a federal agency. *See Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regul. Comm'n*, 962 F.2d 27, 34 (D.C. Cir. 1992) (holding that the ESA "directs agencies to utilize their authorities to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act" (quotations omitted) (alteration in original)). PL 774 authorizes the Dam and guides the Dam's usage, including that California state water law should govern rights to the Dam's water. The ESA does not change the direction provided by PL 774. *See, e.g.*, *WildEarth Guardians v. United States Army Corps of Eng'rs*, 947 F.3d 635, 642 (10th Cir. 2020) (holding that the U.S. Army Corps of Engineers lacked discretion to operate the projects outside of flood control purposes and therefore was not required to comply

with ESA conferral requirements); *Am. Forest Res. Council v. Hammond*, 422 F.Supp.3d 184, 191 (D.D.C. 2019) ("[T]he Supreme Court itself has made clear that section 7(a)(2) of the ESA does not alter *mandatory* duties imposed on agencies by statute." (Alteration in original.)), *appeal docketed*, No. 20-5009 (D.C. Cir. Jan. 24, 2020).

The Ninth Circuit majority Opinion demonstrates a willingness to allow the ESA to impliedly repeal PL 774, and a willingness to override the established California state water law governing the Dam's water. Such a position is not tenable because it creates a systemic risk that any plaintiff can claim that the ESA overrides established state water law when Congress has chosen to defer to state water law. That is not what this Court previously decided in *Home Builders*, and that is not consistent with the Congressional deference to state water law decided in *California*.

CONCLUSION

For these reasons, this Petition should be granted.

Dated this 3rd day of April, 2023.

Respectfully submitted,

JEFFREY V. DUNN
Counsel of Record for Petitioners
GREGG W. KETTLES
BEST BEST & KRIEGER LLP
18101 Von Karman Avenue
Suite 1000
Irvine, CA 92612
(949) 263-2600
Jeffrey.Dunn@bbklaw.com

THOMAS T. WATSON
CITY ATTORNEY
CITY OF SANTA MARIA
City Attorney's Office
204 E. Cook Street
Santa Maria, CA 93454
Counsel for City of Santa Maria

ROBERT J. SAPERSTEIN
AMY STEINFELD
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
1021 Anacapa Street, 2nd Fl.
Santa Barbara, CA 93101
Counsel for Golden State Water Company

MARIO A. JUAREZ
RICHARD E. ADAM, JR.
JUAREZ, ADAM & FARLEY
625 E. Chapel Street
Santa Maria, CA 93454
Counsel for Santa Maria Valley Water Conservation District