

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**

REPLY BRIEF OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

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.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	2
I. THE OPPOSITION RE-ENFORCES WHY THE PETITION SHOULD BE GRANTED BY HIGH- LIGHTING THE MANY FLAWS IN THE NINTH CIRCUIT’S DECISION	2
II. THE COURT’S REVIEW IS WARRANTED UNDER SUPREME COURT RULE 10 BECAUSE SUCH REVIEW WOULD HAVE BROAD IMPACTS BEYOND PUBLIC LAW 774	4
A. The Ninth Circuit Opinion’s Non- delegation Doctrine Holding Decided an Important Question of Federal Law That Should Be Clarified By This Court, and the Opinion’s Refusal to Consider California Water Law Decided an Important Federal Issue in Conflict With This Court’s Decisions	4
B. The Questions Presented on Non- delegation and Cooperative Federalism Have Broad Impacts Beyond This Case	6
C. The Petition Does Not Seek “Inter- locutory” Relief and Instead Requests This Court’s Clarification on a Final Decision	9
CONCLUSION.....	11

TABLE OF AUTHORITIES

Page

CASES

<i>Allen v. Cooper</i> , 140 S. Ct. 994 (2020)	4, 5
<i>California Trout, Inc. v. Fed. Energy Regul.</i> <i>Comm’n</i> , 313 F.3d 1131 (9th Cir. 2002).....	8
<i>Caterpillar Inc. v. Lewis</i> , 519 U.S. 61 (1996)	3
<i>Comm’r of Internal Revenue v. Lincoln Sav. &</i> <i>Loan Ass’n</i> , 403 U.S. 345 (1971)	5
<i>Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.</i> , 240 U.S. 251 (1916)	10
<i>Iancu v. Brunetti</i> , 139 S. Ct. 2294 (2019)	5
<i>Indep. Wireless Tel. Co. v. Radio Corp. of Am.</i> , 270 U.S. 84 (1926)	5
<i>Koshman v. Vilsack</i> , 865 F. Supp. 2d 1083 (E.D. Cal. 2012)	7
<i>Minersville Sch. Dist. v. Gobitis</i> , 310 U.S. 586 (1940)	4, 6
<i>Nat’l Ass’n of Home Builders v. Def. of</i> <i>Wildlife</i> , 551 U.S. 644 (2007)	3
<i>Nature v. United States</i> , 250 F. Supp. 3d 634 (E.D. Cal. 2017)	7
<i>Platte River Whooping Crane Critical Habitat</i> <i>Maint. Trust v. Fed. Energy Regul.</i> <i>Comm’n</i> , 962 F.2d 27 (D.C. Cir. 1992).....	3
<i>Richardson Mach. Co. v. Scott</i> , 276 U.S. 128 (1928)	5

TABLE OF AUTHORITIES – Continued

Page

<i>Sessions v. Dimaya</i> , 138 S. Ct. 1204 (2018)	7
<i>State of California v. United States</i> , 438 U.S. 645 (1978)	6, 8
<i>Strawberry Water Users Ass’n v. United States</i> , 576 F.3d 1133 (10th Cir. 2009)	8
<i>Swint v. Chambers County Comm’n</i> , 514 U.S. 35 (1995)	10
<i>United States v. MacDonald</i> , 435 U.S. 850 (1978)	10
<i>United States v. Rios-Montano</i> , 438 F. Supp. 3d 1149 (S.D. Cal. 2020)	7
<i>United States v. State of Cal., Sate Water Res. Control Bd.</i> , 694 F.2d 1171 (9th Cir. 1982)	6
<i>Whitman v. Am. Trucking Ass’ns, Inc.</i> , 531 U.S. 457 (2001)	7
<i>WildEarth Guardians v. United States Army Corps of Eng’rs</i> , 947 F.3d 635 (10th Cir. 2020)	3

STATUTES

18 U.S.C. § 16.....	7
68 Stat. 1190	2
Public Law 774.....	1, 2, 3, 4, 6, 7, 9

TABLE OF AUTHORITIES – Continued

Page

JUDICIAL RULES

Sup. Ct. R. 10	2, 4
Sup. Ct. R. 10(c)	5, 6
Sup. Ct. R. 15.2	3
Sup. Ct. R. 29.6	i

REGULATIONS

36 C.F.R. § 1.4	7
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INTRODUCTION

The Ninth Circuit below addressed whether Public Law 774, or PL 774,¹ permits the U.S. Bureau of Reclamation and the Santa Maria Valley Water Conservation District to release water from the Twitchell Dam to waste to the ocean for the sole purpose of attempting to facilitate migratory habitat for the Southern California Steelhead.

The Ninth Circuit’s 2-1 decision held that PL 774 affords the Agencies discretion to operate the Dam for “other purposes” beyond those discrete purposes of irrigation, conservation, and flood control authorized in the Secretary’s Report—as incorporated in full into PL 774—including, potentially, for steelhead migration. App.7a. This interpretation ignores PL 774’s requirement to be in “substantial compliance” with the Secretary’s Report, violates the nondelegation doctrine by granting unfettered discretion to the Agencies, and ignores this Court’s precedent deferring to state water law. *See* App.33a.-App.45a.

The Brief for the Federal Respondents² in Opposition to the Petition (“Opposition”) agrees that the Ninth Circuit incorrectly interpreted PL 774. Opp.14 (“The court of appeals’ contrary interpretation of Public Law 774 is incorrect.”); *see also id.* at Opp.10.

¹ All capitalized terms are defined in the Petition.

² Federal Respondents means and includes the U.S. Department of the Interior, U.S. Bureau of Reclamation, and current Bureau of Reclamation Commissioner Camille Touton.

The Opposition is otherwise incorrect to argue that this Court’s review is unwarranted because the Ninth Circuit’s decision “does not satisfy this Court’s criteria for plenary review at this interlocutory stage.” Opp.10. The Petition raises important questions of federal law that should be decided by this Court. Further, the Ninth Circuit decided an important federal issue in conflict with this Court’s decisions. The Petition satisfies the requirements of Supreme Court Rule 10 because granting certiorari will provide uniform direction to the lower courts that is broadly applicable far beyond the Twitchell Dam. Further, the Petition is not “interlocutory.” Accordingly, this Court’s review is warranted.



ARGUMENT

I. THE OPPOSITION RE-ENFORCES WHY THE PETITION SHOULD BE GRANTED BY HIGHLIGHTING THE MANY FLAWS IN THE NINTH CIRCUIT’S DECISION.

The Federal Respondents agree that the Ninth Circuit’s Opinion was wrongly decided: “The court of appeals’ contrary interpretation of Public Law 774 is incorrect.” Opp.14; *see also id.* at Opp.10 (“The court of appeals erred in holding that Public Law 774 provides the Agencies with discretion to operate Twitchell Dam . . . to avoid take of endangered steelhead.”), *ibid.* (“The court of appeals erred in concluding that Public Law 774’s reference to ‘other purposes,’ 68 Stat. 1190, ‘reflects a congressional intent to grant the Agencies discretion to operate [Twitchell

Dam] for a variety of purposes,’ including to facilitate steelhead migration to and from the Pacific Ocean.” (Citing App.12a. (alterations in Opposition)).

Federal Respondents agree that the Ninth Circuit’s interpretation—that PL 774’s “other purposes” residual clause could include the facilitation of steelhead migration—defies the concept of *ejusdem generis*. Opp.11-14 (“Public Law 774’s reference to ‘other purposes’ cannot be read to conflict with Twitchell Dam’s main objectives of water conservation and flood control.”); *see also* Pet.20-21.

Federal Respondents also agree that “[n]othing in the ESA reveals any congressional intent to repeal or modify Public Law 774.” Opp.16 (citing *Nat’l Ass’n of Home Builders v. Def. of Wildlife*, 551 U.S. 644, 662 (2007) (“*Home Builders*”)). The Petition likewise argues that the ESA did not impliedly repeal PL 774. Pet.33-35 (citing *Home Builders*, 551 U.S. at 662); *see also Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regul. Comm’n*, 962 F.2d 27, 34 (D.C. Cir. 1992); *WildEarth Guardians v. United States Army Corps of Eng’rs*, 947 F.3d 635, 642 (10th Cir. 2020). Because PL 774 was not repealed, its deference to state law is required under this Court’s precedent affirming an approach of cooperative federalism.

Federal Respondents were obligated to raise in their Opposition any misstatement of fact or law in the Petition. Sup. Ct. R. 15.2 (“Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition.”); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n. 13 (1996) (“Under this Court’s Rule 15.2, a nonjurisdictional argument not

raised in a respondent's brief in opposition to a petition for a writ of certiorari 'may be deemed waived.'"). Federal Respondents did not raise any misstatements, and, instead, provided further explanation as to why the Opinion below was wrongly decided.

II. THE COURT'S REVIEW IS WARRANTED UNDER SUPREME COURT RULE 10 BECAUSE SUCH REVIEW WOULD HAVE BROAD IMPACTS BEYOND PUBLIC LAW 774.

A. The Ninth Circuit Opinion's Nondelegation Doctrine Holding Decided an Important Question of Federal Law That Should Be Clarified By This Court, and the Opinion's Refusal to Consider California Water Law Decided an Important Federal Issue in Conflict With This Court's Decisions.

Review on a writ of certiorari is a matter of judicial discretion. SUP. CT. R. 10 ("Rule 10"). Rule 10 provides several examples of "compelling reasons" that may justify review, which reasons are "neither controlling nor fully measuring the Court's discretion." *Ibid.* The Opposition focuses solely on the lack of a circuit split interpreting PL 774, but a circuit split is not required to justify the granting of certiorari. *See, e.g., Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020) ("*Allen*"); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 592 (1940) ("*Minersville*"). Petitioners did not offer that as a basis for the Petition.

The Petition satisfies at least two "compelling reasons" warranting review by this Court.

First, review is warranted where "a United States court of appeals has decided an important question of

federal law that has not been, but should be, settled by this Court . . .” Rule 10(c). Recently, such considerations have included where a court of appeals invalidates a federal statute. *See, e.g., Allen*, 140 S. Ct. at 1000; *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019) (“As usual when a lower court has invalidated a federal statute, we granted certiorari.”). Historically, certiorari has been granted to settle a broad variety of important questions of federal law. *See, e.g., Comm’r of Internal Revenue v. Lincoln Sav. & Loan Ass’n*, 403 U.S. 345, 346-47 (1971) (“Because of the importance of the issue for the savings and loan industry and for the Government, we granted certiorari.”); *see also Indep. Wireless Tel. Co. v. Radio Corp. of Am.*, 270 U.S. 84, 86 (1926) (“Our writ of certiorari was granted solely because of the importance the question of patent practice decided in our opinion already announced.”); *Richardson Mach. Co. v. Scott*, 276 U.S. 128, 132 (1928) (“This court, being of opinion that the constitutionality of the statute concerning service, as so construed, was questionable, and that the question of its validity was one of general importance, granted the petition for a writ of certiorari.”).

The questions presented in the Petition are of similar importance. For example, the Petition requests clarification that the nondelegation doctrine should be used as a tool for statutory interpretation. Pet.15-18. Such guidance would assist future courts in preventing an agency of the executive branch from using a residual clause as a *carte blanche* authorization—including authorization of a purpose expressly prohibited by the statute, as occurred here. The nondelegation doctrine can further prevent third parties, such as Plaintiffs here, from changing an agency’s own reasonable

interpretation into one of unrestrained authority subject to the whim of such third parties.

Second, review is warranted where “. . . a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.” Rule 10(c); *see also Minersville*, 310 U.S. at 592.

Here, the Ninth Circuit’s split-panel decision disregards state water law and state water policy and conflicts with prior rulings of this Court. PL 774 requires that the Dam be operated “pursuant to the laws of California relating to water and water rights.” App.77a. Where such language is used, Congress has “clearly provided that state water law would control in the appropriation and later distribution of water.” *State of California v. United States*, 438 U.S. 645, 664 (1978) (“*California*”); *see also* Pet.23-26. This Court should grant the Petition to reinforce its prior decisions that, where a federal statute defers to state water law, then state water law must decide the control, appropriation, use, and distribution of water. *See, e.g., United States v. State of Cal., Sate Water Res. Control Bd.*, 694 F.2d 1171, 1178 (9th Cir. 1982) (finding the United States “may not be indifferent to state interests affected by the operation of an intra-state reclamation project”).

B. The Questions Presented on Nondelegation and Cooperative Federalism Have Broad Impacts Beyond This Case.

The Court’s resolution of either or both of the Petition’s two questions will have broad impacts. Those impacts will extend beyond PL 774 and the Twitchell Dam.

As explained in the Petition, the Ninth Circuit’s interpretation of PL 774 vests the Agencies with unrestricted authority in violation of the “intelligible principle” standard of the nondelegation doctrine. *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001). This is a constitutional issue. Delegation without an “intelligible principle” is a violation of the separation of powers. The question presented by the Petition is not whether PL 774 is constitutional, but rather, whether the Ninth Circuit’s interpretation of PL 774 is constitutional. In order to ensure statutory interpretation leads to a constitutional application, the nondelegation doctrine should be used as an aid to statutory interpretation to prevent courts—such as the Ninth Circuit—from interpreting a federal statute’s “and other purposes” clause to vest an agency with unrestricted and therefore unconstitutional authority. This is an important constitutional question that merits certiorari.

While PL 774 applies exclusively to the Twitchell Dam, it is not the only piece of legislation that uses residual phrases such as “other purposes.” Similar phrases are used in numerous federal statutes in a variety of contexts. *See, e.g., Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018) (addressing the residual clause “any other offense” in 18 U.S.C. § 16); *Nature v. United States*, 250 F. Supp. 3d 634, 638 (E.D. Cal. 2017) (interpreting 36 C.F.R. § 1.4’s “other purposes” residual clause); *United States v. Rios-Montano*, 438 F. Supp. 3d 1149, 1153 (S.D. Cal. 2020) (analyzing the National Defense Authorization Act’s prefatory clause ending in “for other purposes”); *Koshman v. Vilsack*, 865 F. Supp. 2d 1083, 1094 (E.D. Cal. 2012) (interpreting the Food Security Act of 1985 which

includes a residual clause “and for other purposes”). Clarifying the application of the nondelegation doctrine to prevent the unconstitutional expansion of agency authority in statutes such as these would have ramifications far beyond this case. It would certainly “affect operations of other federal reclamation projects” and “apply in other contexts.” Opp.16.

Further, cooperative federalism is a matter of great importance to the state and federal governments. In this case, it requires that the state-law limitations imposed on the Dam be upheld. *See* Pet.26-32. Numerous cases have followed the Supreme Court’s guidance set forth in *California* and have appropriately deferred to state water law. *See, e.g., California Trout, Inc. v. Fed. Energy Regul. Comm’n*, 313 F.3d 1131, 1137 (9th Cir. 2002); *Strawberry Water Users Ass’n v. United States*, 576 F.3d 1133, 1148 (10th Cir. 2009). The Petition asks only that the Court reinforce this important tenet and prevent the Ninth Circuit here, and future courts, from rendering state law a nullity.

Federal Respondents misconstrue the Ninth Circuit’s decision to not address California water law. Opp.17. The Ninth Circuit declined “to consider Plaintiffs’ arguments, raised for the first time on appeal, concerning the requirements of California state law.” App. 23a, n.3; *see also* App.50a, n. 16. Plaintiffs had asked the Ninth Circuit to decide, for the first time on appeal, what California statutory and regulatory law substantively required for the protection of an endangered steelhead species. That is not the issue raised here by the Petition. The Petition does not ask this Court to opine for the first time on the meaning and interpretation of California’s endangered species laws. Rather, the Petition asks that the Court

confirm that the Ninth Circuit was required to consider California's laws for the use and appropriation of the Dam's water, consistent with the plain language of PL 774 and the principles set forth by this Court.

To be clear, while the Ninth Circuit acknowledged that PL 774 is constrained by California water law, it failed to actually apply California water law to the facts. The Opinion states that "[t]he Agencies' discretion **is constrained by the requirement to comply with California water law** and to substantially comply with the recommendations in the Secretary's Report." App.18a-19a (emphasis added). But the Opinion then failed to address how either (1) the surface water rights appropriated pursuant to the Dam's Permit and License, or (2) the groundwater rights adjudicated pursuant to the Santa Maria Judgment, actually impacted its decision on what discretion the Agencies ultimately held.

The question presented by the Petition is whether the Ninth Circuit violated established principles of cooperative federalism when it failed to consider state water law and state water rights in interpreting PL 774's authorized use of the water from the Dam's operations. That issue was raised, but not examined, by the Ninth Circuit below.

C. The Petition Does Not Seek "Interlocutory" Relief and Instead Requests This Court's Clarification on a Final Decision.

The Ninth Circuit split-panel majority decided that the Agencies had discretion to release water from the Dam beyond the enumerated purposes in PL 774, including, potentially, to support steelhead migration. The Petition does not address the amount of water that

can be released from the Dam, but rather, questions whether even a single drop of water can be purposefully wasted to the ocean to support the steelhead. Federal Respondents conflate these two issues. Opp.17-19.

An interlocutory appeal implies that the order being appealed is not “final.” *Swint v. Chambers County Comm’n*, 514 U.S. 35, 49 (1995). The decision of the Ninth Circuit was final and is not being relitigated at the District Court level on remand.³ That the case continues on remand alone does not make this appeal interlocutory. *See United States v. MacDonald*, 435 U.S. 850, 852-53 (1978) (granting certiorari after the court of appeals, by divided vote, had remanded the case and denied a petition for rehearing *en banc*).

The Petition does not seek such interlocutory relief. The Petition requests clarification on the Ninth Circuit’s decision to the extent it permits *any* discretion to release *any* amount of water from the Dam. The nondelegation doctrine, when used as a tool of statutory interpretation, would prevent such an outcome. So too would application of the principles of cooperative federalism set forth by this Court in decades-old

³ The case cited by Federal Respondents, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), involved a petitioner’s requested review of proceedings where the lower courts had decided that defendant engaged in unfair trade practices, but had not yet assigned damages. The Court did not grant certiorari until a second appeal, after damages had been assigned. That is distinguishable from the case here. The Ninth Circuit has decided the threshold issue that water can be released from the Dam for certain undefined “other purposes.” It is this final decision that is being appealed; it is not the amount of water that can be released that is being appealed.

precedent. Any dispute over the amount of water to be released is a separate and discrete issue from the two questions presented in the Petition.



CONCLUSION

For these reasons, the Petition should be granted.

Respectfully submitted,

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