No. 25-266

IN THE

# Supreme Court of the United States

CITY OF FRESNO, CALIFORNIA, *et al.*,

*Petitioners,*

*v.*

UNITED STATES, *et al.*,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## REPLY BRIEF FOR PETITIONERS


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## ARGUMENT

This case squarely presents two closely related Fifth Amendment takings questions that have enormous consequences for 140,000 Western States growers whose livelihoods, and the crops they produce, depend on federal Reclamation Project irrigation water. The Federal Circuit's rejection of the petitioner water districts' takings claim—which they bring on behalf of the 15,000 Central Valley Project/Friant Division growers whom they serve—gives the Bureau of Reclamation free rein to deprive growers anywhere in the United States of their state-law property rights in Reclamation Project water without payment of compensation. Only this Court can vindicate the Friant Division growers' Fifth Amendment right to just compensation for Reclamation's devastating taking of their water-property rights when it decided in the midst of a severe drought to provide them with *none* of the available water.

The Federal Circuit held that there was no taking because California growers who depend on Reclamation Project irrigation water to produce a cornucopia of fruit, nut, and vegetable crops do not "possess any property rights in water delivery from the government." App-37a. According to the court of appeals, "Appellants do not have any water rights under California law because . . . it is *Reclamation*" that holds those rights. App-35a. The government agrees. *See* U.S. Br. at 14.

The court's holding is wrong. For starters, it directly conflicts with the plain language of Section 8 of the Reclamation Act. To promote cooperative federalism and achieve national uniformity, Section 8 preserves state law relating to "appropriation, control, use, or distribution of [Reclamation Project] water used in irrigation." 43 U.S.C. § 383, "*Provided* That the right to the use of [Reclamation Project] water . . . shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." *Id.* § 372. To be consistent with this proviso, state water law must vest (or be construed to vest) ownership of Reclamation Project water-property rights in the landowners (i.e., growers) who beneficially use the water to irrigate their crops. *See* Pet. at 5-6. Thus, in accordance with Section 8, and contrary to the Federal Circuit's no-property-rights ruling, the Friant Division growers have California state-law water-property rights in Reclamation Project water.

The Supreme Court has consistently construed the Section 8 proviso in this manner. *See* Pet. at 17-21 (discussing Reclamation Act precedents). Since the Federal Circuit has exclusive jurisdiction over Court of Federal Claims takings decisions, *see* 28 U.S.C. § 1295(a)(3), there is no possibility that the Reclamation Act takings questions presented by this case will be addressed by other circuits. This makes the need for immediate review of the Federal Circuit's opinion, which directly conflicts with this Court's relevant Reclamation Act precedents, compelling. *See*

Sup. Ct. R. 10(c). The Court should grant certiorari to correct the Federal Circuit's fundamentally flawed takings analysis and reaffirm that under Section 8, "the water rights [are] the property of the landowners," *Ickes v. Fox*, 300 U.S. 82, 95 (1937).

1. The government's brief repeatedly attacks a straw man by arguing that state law governs water-property rights in connection with Bureau of Reclamation takings. *See*, *e.g.,* U.S. Br. at 10-13. References in the government's brief to "petitioners' assertion of a federal-law-based property right notwithstanding contrary California state law," *id.* at 13, and "petitioners' assertion of a federal-law-based property interest" in Reclamation Project water, *id.* at 10, misleadingly suggest that that Petitioners dispute the state-law nature of the water-property rights at issue in this Fifth Amendment takings case. A section of the government's brief even begins by asserting that "Petitioners *alternatively* contend. . . that California state law grants them property rights in the Project water at issue." *Id.* at 14 (emphasis added).

a. Contrary to these mischaracterizations, Petitioners contend that Reclamation has taken the Friant Division growers' *state-law* water-property rights without payment of just compensation.[1] As the

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[1]The Federal Circuit's opinion acknowledges that "[t]he takings claim was brought by the Friant Contractors," *i.e.*, the petitioner Friant Division water districts, "on behalf of non-party individuals," *i.e.* the Friant Division growers, "to whom they deliver water." App-32a n.11.

certiorari petition explains, Section 8 of the Reclamation Act preserves state authority to determine water-property rights, *subject to* the express proviso in Section 8 that "the right to the use of [Reclamation Project] water . . . shall be appurtenant to the land irrigated." 43 U.S.C. § 372.[2] Coupled with the proviso's declaration that "beneficial use shall be the basis, the measure, and the limit of the right," *id.*, Petitioners contend that growers who use Reclamation Project water to irrigate their land are the beneficial owners of a *state-law* property right in that water. *See* Pet. at 6, 17. Oblivious to this Court's directly relevant Reclamation Act precedents, *see* Pet. at 17-21, the Federal Circuit held that the growers possess no such water-property right, and thus that there was no Fifth Amendment taking. App-37a.

b. As part of its straw man argument, the government cites *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), as authority "that California state law determines property rights for purposes of takings claims involving the [Central Valley Project]." U.S. Br. at 11. The government's assertion, however, that "[t]his Court [in *Gerlach*] has already applied Section 8," is an overstatement. Unlike the situation here, the Court in *Gerlach* affirmed compensation awards for Reclamation's taking of California

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[2] Petitioners regret that the certiorari petition contains two typographical errors that cite the Section 8 proviso as 28 U.S.C. § 372 rather than 43 U.S.C.§ 372.

grassland owners' state-law riparian property rights in connection with construction of the Central Valley Project. *Gerlach*, 339 U.S. at 727-28. In a footnote quoting only the first part of Section 8, the Court observed that "[t]o the extent that [Section 8] is applicable this clearly leaves to the State to say what rights an appropriator or riparian owner may subsist along with any federal right." *Id.* at 734 n.7.

The government's citation to *City of Fresno v. California*, 372 U.S. 627, 630 (1963), disavowed in part by *California* v. *United States*, 438 U.S. 645 (1978), proves nothing more than that Section 8 preserves state law. The same is true for the government's abbreviated quotations from *Ickes v. Fox*, 300 U.S. 82 (1937), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Nevada v. United States*, 462 U.S. 110 (1983).

c. The government's brief also cites *Klamath Irrigation District v. United States*, 67 Fed. Cl. 504 (2005), erroneously asserting that "the courts rejected an argument essentially identical to petitioners'." U.S. Br. at 13 n.7. In *Klamath*, however, the Court of Federal Claims *mistakenly* stated that the plaintiffs claimed "that the Reclamation Act establishes a *federal* property right to the use of water in the case of irrigation appurtenant to the land." 67 Fed. Cl. at 519 (emphasis added). Even if this had been the *Klamath* plaintiffs' argument—it was not—this is not what Petitioners contend here. Further, in a latter stage of the *Klamath* litigation, which involved a Reclamation Project in Oregon, the Federal Circuit held, *sub nom. Baley v. United States*, 942 F.3d 1312 (Fed. Cir. 2019),

that the *Klamath* plaintiffs had state-law property rights in the Reclamation Project water but that a Native American tribe had rights that were senior in priority.

The issue here is not whether *state-law* water property rights apply. The first part of Section 8, 43 U.S.C. § 383, confirms that they do. Instead, the principal question presented for this Court's resolution is whether in view of Section 8's proviso, *id.* § 372, those state-law property rights are compensable where, as here, they essentially have been abrogated by Reclamation.

d. The Reclamation Act's plain text makes clear that the Section 8 proviso is a requirement with which state water-property law must comply. California law comports with the proviso, and by so doing, creates the appurtenant property rights in Reclamation Project water that the Federal Circuit erroneously held do not exist.

More specifically, in approving Reclamation's Central Valley Project permits for construction of Friant Division infrastructure, the State Water Resources Control Board ("SWRCB") issued Decision No. D 935 (June 2, 1959).[3] This seminal decision explained that Section 8 "contains a provision . . . *long accepted as fundamental law* in many western courts and also in *numerous decisions of the U.S. Supreme Court*." D 935 at 94 (emphasis added). SWRCB

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[3] Available at https://tinyurl.com/364wp584.

concluded that because of the Section 8 proviso, it did not matter who the named permittee was since the *beneficial users* of Reclamation Project irrigation water are vested with the water-property rights. *See id.* at 98 ("Even though formal title to the use is held of record by the permittee or licensee, *the right by use is vested in those by whom the use has been made*, as a matter of law.") (emphasis in original).

Because the proposed permittee of the Friant Division infrastructure involved in D 935 was Reclamation (i.e., the United States), the SWRCB included an express condition in Reclamation's permits to clarify that the water rights established by the permits become appurtenant to the land irrigated. *See id.* at 99 ("Permits issued to the United States should contain a condition to the effect that water used thereunder for irrigation . . . will by use . . . be appurtenant to the land on which used. . . ."). Thus, consistent with the Section 8 proviso, SWRCB imposed the following condition on Reclamation's Friant Division permits: "The right to the beneficial use of water for irrigation purposes . . . shall be appurtenant to land on which said water shall be applied, subject to continued beneficial use. . . ." *Id.* at 107.

The government's brief overlooks this highly significant SWRCB determination concerning water users' property rights in Reclamation Project water that is appurtenant to their land. SWRCB's conclusive discussion of California water law in relation to Section 8 of the Reclamation Act, both in general and

as to Friant Division landowners and growers in particular, belies the repeated assertions in the government's brief that because Reclamation is the named permittee, it alone holds the water-property rights. *See* U.S. Br. at 6, 8, 13, 14. And it flatly contradicts the Federal Circuit's conclusion that "California law does not assign property rights in water based on the uses put to it by the end users." App-36a.[4]

2. The government attempts to turn the Section 8 proviso on its head by arguing that this crucial requirement for state-law property rights in Reclamation Project water "merely limits the scope of rights '*already*' granted under 'state law' pursuant to the Reclamation Act." U.S. Br. at 13 (quoting *United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1229 (9th Cir. 1989)). This passage from *Alpine Land* focuses on the proviso's "beneficial use requirement." It in no way undermines the proviso's mandate that any state-law "right to the use of [Reclamation Project] water . . . shall be appurtenant to the land irrigated." 43 U.S.C. § 372.

The government's interpretation would render the entire proviso meaningless. It would enable any State to decide for itself whether a grower's beneficial use of appurtenant Reclamation Project water creates a

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[4] As discussed in the certiorari petition, a subsequent SWRCB decision, D 1641 (Mar. 15, 2000), briefly refers to Reclamation's nominal title to "appropriative rights" in connection with its initial Central Valley Project activities. *See* Pet. at 26.

state-law water-property right, and thus compensable under the Takings Clause.

3. Notably, the government's brief, like the Federal Circuit's opinion, ignores the most relevant passages from this Court's opinions in *Ickes*, *Nebraska*, *California*, and *Nevada* concerning the effect of the Section 8 proviso on state-law property rights in connection with beneficial use of Reclamation Project water. For example:

• "[B]y the terms of the law . . . the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works." *Ickes*, 300 U.S. at 95;

• "The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use." *Nebraska*, 325 U.S. at 614;

• "Congress provided in § 8 itself that the water right must be appurtenant to the land irrigated and governed by beneficial use." *California*, 438 U.S. at 668 n.21;

• "[T]he Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the

application of Project water to the land." *Nevada*, 463 U.S. at 126.

The Federal Circuit's conclusion that the state-law property rights in Reclamation Project water belong to Reclamation, not to the growers who beneficially use the water, cannot be squared with either the plain text of the Section 8 proviso or these Supreme Court precedents.

4. The government also attempts to write off the conflict between the Federal Circuit's opinion and two other Federal Circuit takings cases by distinguishing them on the facts. But the court's ruling here clashes with the water-property rights principles discussed in those other Federal Circuit cases. *See* Pet. at 21-24.

In *Casitas Municipal Water District v. United States*, 708 F.3d 1340, 1353 (Fed. Cir. 2013), the court of appeals explained that under California law "the right of property in the water is usufructuary, and consists not so much of the fluid itself as the advantage of its use." Thus, "the only compensable right under California water law is a right to beneficial use." *Id.* at 1357 (citation omitted). And "the state of California does not categorize storage or diversion for storage . . . as beneficial uses." *Id.* at 1356. Thus, under California law, Reclamation's Friant Division water storage and diversion activities

are not beneficial uses for purposes of water-property rights.[5]

Along the same lines, in *Baley v. United States*, 942 F.3d at 1321 (*see supra* at 5-6), the court of appeals explained that "[i]ndividual plaintiff landowners (or their lessees) have applied water to irrigate their crops. In this manner, they have put Klamath Project water to beneficial use. As a result, the water became appurtenant to their land" (internal citation omitted).

The Federal Circuit's opinions in *Casitas* and *Baley*, therefore, unlike the Federal Circuit opinion below, are consistent with the Reclamation Act's Section 8 proviso.

5. The government's brief adorns its straw man with a red herring by asserting that "to the extent that petitioners do raise a federal question, they do not assert that it is the subject of a circuit split." U.S. Br. at 16. Fifth Amendment takings issues, like those presented here, are quintessential federal questions. The questions presented by this case are federal questions because they concern the effect of the Reclamation Act's Section 8 proviso on state-law water-property rights. The Federal Circuit did not hesitate to interpret, albeit erroneously, California water-rights law as part of its Fifth Amendment

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[5] The government's brief mistakenly asserts that Petitioners' appellate briefs did not cite *Casitas*. *See* U.S. Br. at 15 n.3. Petitioners discussed *Casitas* in its Federal Circuit rehearing petition and cited it in the Statement of Counsel.

takings analysis. *See* App-34a-35a ("[W]e must assess whether the Friant Contractors or the Friant Growers possess property rights under California law.").

Further, no other circuit could have entertained the takings claim in this case. The Federal Circuit has exclusive jurisdiction over decisions of the Court of Federal Claims, 28 U.S.C. § 1295(a)(3), and that court has exclusive jurisdiction over takings claims in excess of $10,000. *See* 28 U.S.C. §§ 1491(a)(1) & 1346(a)(2). The government asserts that "Reclamation Act issues arise in various contexts that are not committed to the Federal Circuit's exclusive jurisdiction." U.S. Br. at 16. But insofar as other circuits can address such "related issues," *id.*, that is not the same as adjudicating a takings claim.

6. Even though Petitioners do not seek this Court's review of the Federal Circuit's breach of contract ruling, the government quotes the Court of Federal Claims statement that Petitioners "cannot assert property rights greater than those secured through their contracts." U.S. Br. at 16. This statement refers to the water districts; it is wholly irrelevant to the *growers'* takings claim, which the government acknowledges the water districts are pursuing on the growers' behalf. *Id.* at 8-9. Indeed, the government's brief emphasizes that "the Friant Growers . . . are not parties to the Friant Contract." *Id.* at 6-7. Thus, the trial court's ruling that the Friant Division water districts "lack contractual rights to the water" is neither relevant to the growers' takings claim nor a case-specific "complication." *Id.* at 17.

7. As the Mountain States Legal Foundation explains in its amicus brief urging the Court to grant certiorari, the Federal Circuit's "error defied Supreme Court precedent and has potentially staggering consequences across the West." Br. at 3. Nothing in the government's brief suggests, much less demonstrates, that the federal takings questions presented by this case are anything short of monumental. Although the growers' takings claim arises out of Reclamation's 2014 zero-allocation decision, the Federal Circuit's ruling enables Reclamation to leave tens of thousands of Reclamation Project water-dependent growers and their crops across 17 Western States in the dust whenever it so chooses, for whatever reason, and without providing just compensation. This Court needs to grant review and correct the Federal Circuit's error.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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