No.

IN THE

Supreme Court of the United States

UNITED WATER CONSERVATION DISTRICT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government's appropriation of water that a person had a property right to use is analyzed as a physical taking, rather than a regulatory taking, under the Fifth Amendment.

RELATED PROCEEDINGS

United States Court of Federal Claims:

United Water Conservation District v. *United States*,
No. 22-cv-542 (Jan. 26, 2023)

United States Court of Appeals (Fed. Cir.):

United Water Conservation District v. *United States*,
No. 23-1602 (Apr. 2, 2025)

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Petitioner United Water Conservation District respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 133 F.4th 1050. The order of the Court of Federal Claims dismissing the complaint (App., *infra*, 15a-40a) is reported at 164 Fed. Cl. 79.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2025. A petition for rehearing was denied

on July 29, 2025 (App., *infra*, 41a-43a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

The Tucker Act provides in pertinent part: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded * * * upon the Constitution * * * or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

INTRODUCTION

In recent years, this Court has rejected attempts to inject doctrinal complexity into the Takings Clause that frustrates its core mandate: The government must pay just compensation when it takes private property for itself. The Court instead has recognized simple, categorical rules that safeguard property from physical expropriation by the government—cabining the unpredictable regulatory-takings balancing approach of *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), to mere limitations on a person's right to use his own property. *E.g.*, *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 149 (2021); *Horne* v. *Department of Agriculture*, 576 U.S. 351, 361 (2015). The Court's decisions have fortified the Takings Clause's enduring protection against attempts to balance away property rights.

But that protection is only as strong as courts' willingness to enforce it. Below, the Federal Circuit

did the opposite by expanding the reach of *Penn Central* to the physical taking of water rights. It did so by interposing arbitrary exceptions to physical-takings doctrine that have no basis in the Constitution's text, case law, or logic but that, left unchecked, will seriously erode the Takings Clause's central guarantee.

Petitioner is a water-conservation district with an undisputed property right under California law to divert and use a fixed amount of water (up to 144,630 acre-feet of water per year) from a particular river. The United States commandeered a sizable chunk of that water for its own purposes: facilitating fish migration by sending water downstream. Needless to say, petitioner is never getting that water back. Yet the Federal Circuit shoehorned petitioner's claim for the physical taking of its water rights into the balancing framework of *Penn Central* by reconceptualizing the government's action as a regulatory taking. The Federal Circuit then kicked the claim out of court, holding that such regulatory-takings claims are unripe so long as license proceedings under the Endangered Species Act remain ongoing.

That conclusion erases this Court's dividing line between physical and regulatory takings. When the government "appropriat[es] private property for itself or a third party," it "must pay for what it takes"—no ifs, ands, or buts. *Cedar Point*, 594 U.S. at 148. But the Federal Circuit rerouted petitioner into *Penn Central* by inventing novel carveouts to physical-takings law: The United States took petitioner's water rights only partially, not "completely"; it intercepted the water for its own use before the water reached petitioner; and it acted through "regulation" rather than formal eminent-domain proceedings. App., *infra*, 11a, 13a. This Court has repeatedly and recently rejected such contrived

workarounds to the Takings Clause as "insupportable as a matter of precedent and common sense." *Cedar Point*, 594 U.S. at 153; see *id.* at 153-156. It should do the same here.

The Federal Circuit put *Penn Central* on a stage where it has never belonged. For almost a century, this Court has held that the Takings Clause mandates the payment of just compensation whenever the United States requires a person to relinquish a right to use water, which is "turned elsewhere by government requisition" to its own ends. *International Paper Co.* v. *United States*, 282 U.S. 399, 407 (1931). The Court also has analogized the "partial taking of water rights" to the physical "taking of air space over land." *Dugan* v. *Rank*, 372 U.S. 609, 625 (1963). *Cedar Point* confirmed that physical invasions of the right to exclude remain *per se* takings that categorically require payment of just compensation. 594 U.S. at 156. That is no less true of the partial taking of water rights.

The Court's intervention is urgently needed. The Federal Circuit establishes nationwide precedent for claims seeking just compensation from the United States because it alone hears appeals from the Court of Federal Claims, which has exclusive jurisdiction over just-compensation claims for more than $10,000 against the United States. Those courts routinely adjudicate claims that the United States has taken water rights without compensation. And such disputes have only increased as the administrative state has fueled more and more of its regulatory agenda with water that others have a property right to use. Only this Court can restore the centuries-old principle that the United States must honor state water rights as it finds them.

Although the question presented is exceptionally important on its own terms, the decision below is by no means limited to water. The Federal Circuit has resurrected the *ancien régime* that this Court swept away in *Horne* and *Cedar Point*. And the Federal Circuit's precedent governs the Court of Federal Claims when it hears any claim seeking just compensation from the United States. The Court has not hesitated to step in when the Federal Circuit gets an important question wrong for the entire Nation and should not hesitate to do so here.

This case also is an ideal vehicle. The United States has never disputed that petitioner possesses a state-law property interest in its water rights. Nor does the government deny that petitioner was entitled under California law to divert the water that the government instead repurposed to further its own policy priorities. And the question presented was squarely pressed and passed upon below. This case thus offers this Court a clean opportunity to reject the Federal Circuit's artificial limitations on the physical-takings framework and to reiterate that *Penn Central* did not override traditional decisions recognizing *per se* takings. The petition should be granted.

STATEMENT

1. "[T]he two basic doctrines governing the rights to the use of water" are "[t]he prior appropriation doctrine and the riparian doctrine." *Colorado* v. *New Mexico*, 459 U.S. 176, 179 n.4 (1982). Many States (mostly in the eastern half of the Nation) follow the riparian doctrine, which accords downstream landowners an entitlement to a "variable" amount of water depending on many factors. *Ibid.* By contrast, under the prior-appropriation doctrine—prevalent in the West—rights are "fixed in quantity" and "do not

depend on land ownership but are acquired and maintained by actual use" of the water. *Ibid.* The core principle of the prior-appropriation doctrine is that the first user to redirect water to his own use "acquire[s] a property in the current." 2 William Blackstone, *Commentaries on the Laws of England* 403 (1776).

Unlike many States, California has chosen to recognize both riparian and appropriative rights. *In re Water of Hallett Creek Stream System*, 44 Cal. 3d 448, 458 (1988). As to the latter, as with other western States, California has long followed the doctrine that first in time is first in right for water. *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 747 (1950) (citing *Irwin* v. *Phillips*, 5 Cal. 140 (1855)). The right one "gains by diversion of a stream for a beneficial use" is property "subject to ownership and disposition by him, as in the case of other private property." *Thayer* v. *California Development Co.*, 164 Cal. 117, 125 (1912).

The federal government has never asserted superior title to California's waters. California entered "the Union on an equal footing with the original States in all respects whatever." California Statehood Act, ch. 50, § 1, 9 Stat. 452 (1850). Indeed, in the 1860s, Congress disavowed any attempt to override state water rights, even where water flowed through land that the United States owned. *California* v. *United States*, 438 U.S. 645, 656 (1978) (citing Mining Act of 1866, ch. 262, § 9, 14 Stat. 253). This Court later "reaffirmed that each State 'may determine for itself whether'" to grant appropriative or riparian rights because "'Congress cannot enforce either rule upon any State.'" *Id.* at 663 (quoting *Kansas* v. *Colorado*, 206 U.S. 46, 94 (1907)).

Since 1914, California has assigned appropriative rights through state-issued licenses and permits. *California Farm Bureau Federation* v. *State Water Resources Control Board*, 51 Cal. 4th 421, 429 (2011). Both licenses and permits may grant the right to take up to a certain amount of water, as "reasonably required for the beneficial use to be served." Cal. Const. Art. X, § 2. Licenses "confir[m] the right to the appropriation of such an amount of water as has been determined to have been applied to beneficial use." Cal. Water Code § 1610. Permits similarly grant a "right to take and use water" for the uses specified in the permit. *Id.* § 1381. And "once rights to use water are acquired, they become vested property rights" that cannot be taken without "just compensation." *United States* v. *State Water Resources Control Board*, 182 Cal. App. 3d 82, 101 (1986) (citing *Gerlach*, 339 U.S. at 752-754).

2. a. Petitioner is a water-conservation district established under California law. App., *infra*, 2a; see Cal. Water Code § 74000 *et seq.* Water-conservation districts are local agencies whose directors are elected by their constituents. Cal. Water Code § 74203. Petitioner's territory reaches across 214,000 acres in Ventura County and includes all or part of eight groundwater basins. *City of San Buenaventura* v. *United Water Conservation District*, 3 Cal. 5th 1191, 1198 (2017). Within that territory, petitioner serves 400,000 residents, as well as farmers with 85,102 acres of agricultural land. C.A. App. 23.

The California State Water Resources Control Board issued petitioner a license in 1958 and a permit in 1983 to appropriate and divert water from the Santa Clara River for numerous beneficial uses, including recharging groundwater aquifers, delivering

surface water to groundwater users, and stabilizing the riverbed. App., *infra*, 2a-3a. Both the license and permit grant petitioner appropriative property rights. *Id.* at 9a. It has the right to appropriate up to 144,630 acre-feet of water per year. *Id.* at 4a.

Petitioner exercises that right to the fullest, seeking to divert as much water as possible for "aquifer recharge" and for the benefit of its users through "surface deliveries." C.A. App. 25. But petitioner is limited by the amount of water actually available in the Santa Clara River. Between 1991 and 2014, for example, petitioner was able to divert on average less than half (roughly 71,000 acre-feet) of its annual entitlement. *Id.* at 26; App., *infra*, 18a-19a.

b. As amended in 1987, petitioner's permit authorized it to construct a dam to divert water in the Santa Clara River for its beneficial use. App., *infra*, 3a. In 1991, petitioner completed the Vern Freeman Diversion Dam, built in part with federal funds from the Bureau of Reclamation. *Id.* at 17a. The dam diverts water into a canal for petitioner to use and to distribute to its customers in line with its license and permit. *Id.* at 3a.

Petitioner built a fish ladder at the dam to allow fish to travel up the river, App., *infra*, 18a, and one of those fish caused petitioner's property rights to collide with the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884. Congress enacted the Act to further a "policy * * * that all Federal departments and agencies shall seek to conserve endangered species and threatened species." 16 U.S.C. § 1531(c)(1). Years after completion of the dam, the National Marine Fisheries Service designated the southern California steelhead trout as an endangered species. App., *infra*, 3a; see 62 Fed. Reg. 43937-01 (1997). That

action triggered a ban on "tak[ing]" the fish. 16 U.S.C. § 1538(a)(1)(B). This Court has construed "take" in the Act to include "habitat modification" that "indirect[ly]" harms members of the designated species. *Babbitt* v. *Sweet Home Chapter, Communities for Great Oregon*, 515 U.S. 687, 697-698 (1995). The federal government can issue permits to take endangered species "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B).

The Bureau of Reclamation later initiated a proceeding under the Endangered Species Act to determine whether the operation of petitioner's dam would harm steelhead trout. App., *infra*, 20a-21a. In 2008, the Service issued a proposed biological opinion finding that the dam could jeopardize the trout's migration and advocating restrictions on the dam's operation to increase the "bypass flow" at the dam, meaning the amount of water left flowing through the Santa Clara River (directly or through the fish ladder). *Id.* at 21a; see *United States Fish and Wildlife Service* v. *Sierra Club, Inc.*, 592 U.S. 261, 264-265 (2021) (describing role of biological opinions for interagency coordination under the Act). The Bureau thereafter terminated the proceeding because (despite providing initial funding) it does not own or operate the dam. App., *infra*, 21a.

The issue resurfaced in 2016, when the Service sent petitioner a letter stating that "a significant issue regarding ongoing take of endangered southern California steelhead trout exists at the Diversion Dam." App., *infra*, 3a (brackets and citation omitted). The Service opined that the dam's operation had violated the Act and ordered petitioner to increase the bypass flow, as the Service had recommended in its 2008 biological

opinion. *Id.* at 4a. In other words, the Service commandeered the use of the water by forcing petitioner to send it downstream, to facilitate the migration of the trout, rather than diverting it at the dam to petitioner's uses. The Service instructed petitioner that "these measures must be in place before December 1, 2016." *Id.* at 24a (citation and emphasis omitted).

Facing significant civil and even criminal penalties, petitioner did as the Service demanded and surrendered more of its water to flow downstream. App., *infra*, 25a-26a; see 16 U.S.C. § 1540(a)-(b). A federal district court in California also later issued a permanent injunction under the Endangered Species Act requiring petitioner to continue abiding by the measures in the 2008 biological opinion. App., *infra*, 22a-23a. As a result, petitioner lost at least 49,800 acre-feet of water between 2017 and 2021—reducing the amount petitioner could divert further below its annual entitlement. *Id.* at 26a. Because the average household in the area uses between one half and one acre-foot of water per year, that water could have supported many tens of thousands of families. C.A. App. 23-24. The Service instead claimed priority to use the water to increase bypass flow for steelhead trout. App., *infra*, 26a.

3. Petitioner sued in the Court of Federal Claims for just compensation under the Fifth Amendment's Takings Clause. C.A. App. 18-40. Claiming a physical taking of its appropriative rights, petitioner sought at least $40 million for the 49,800 acre-feet of water that the Service had commandeered for public use under the Endangered Species Act. App., *infra*, 26a-27a.

The United States moved to dismiss the complaint for lack of subject-matter jurisdiction, asserting the absence of "final agency action." App., *infra*, 27a. The government has never disputed that petitioner's

"appropriative rights are private property rights." *Id.* at 29a. But it argued that petitioner had to exhaust a request for an incidental-take permit under the Endangered Species Act before challenging the taking of its water rights. *Ibid.*

The Court of Federal Claims dismissed the complaint for lack of subject-matter jurisdiction. App., *infra*, 15a-40a. The court understood its jurisdiction to depend on whether petitioner challenged a physical or regulatory taking. *Id.* at 28a-29a. It also noted that the Federal Circuit had previously held that a government mandate to "build [a] fish ladder and divert water" to facilitate the migration of steelhead trout "should be analyzed under the physical takings rubric." *Id.* at 35a (quoting *Casitas Municipal Water District* v. *United States*, 543 F.3d 1276, 1296 (Fed. Cir. 2008)) (emphasis omitted). But the Court of Federal Claims concluded that the physical-takings framework applies only when the government's public use requires the return of "water that was *already* diverted into [a] diversion canal," and not (as here) when the government *prevents* water from being diverted in the first place. *Id.* at 37a (emphasis added). The court then held that petitioner's claim, once recharacterized as a regulatory-takings challenge, was not ripe because petitioner had not exhausted a request for an incidental-take permit. *Id.* at 39a.

4. The Federal Circuit affirmed, upholding the dismissal for lack of jurisdiction on the theory that petitioner asserted an unripe regulatory-takings claim, not a physical-takings claim. App., *infra*, 1a-14a.

The court of appeals acknowledged that petitioner asserted a valid property interest. App., *infra*, 9a-10a. It recognized that generally "the property rights protected by the Takings Clause are creatures of state

law." *Id.* at 9a (quoting *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 155 (2021)). And the court noted that the United States did not dispute "that [petitioner] acquired a valid, appropriative property right in the beneficial use of water it diverts to the Freeman Canal." *Ibid.* That right to use the water is "private property." *Id.* at 10a (citation omitted).

The court of appeals held, however, that the United States did not physically take petitioner's appropriative rights by reallocating the use of water that petitioner had a right to divert under its license and permit. App., *infra*, 11a-12a. In the court's view, a physical taking would occur only if the United States had either (1) "*completely* cut off [petitioner's] access to the water" or (2) required petitioner "to *return* any volume of water it had previously diverted to its possession." *Id.* at 11a (emphases added).

The court of appeals did not dispute petitioner's contention that this Court had held in a trio of decisions—*International Paper Co.* v. *United States*, 282 U.S. 399 (1931), *Gerlach*, *supra*, and *Dugan* v. *Rank*, 372 U.S. 609 (1963)—that similar appropriations of water rights were takings without drawing any distinction between water taken before or after entry into someone's facility. App., *infra*, 12a-13a. Yet the Federal Circuit discounted those decisions because they predated *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), and "did not arise from a regulation." App., *infra*, 13a. The court also sought to distinguish *Gerlach* and *Dugan* on the theory that only riparian rights, but not appropriative rights, "vest" as property interests before water has been diverted. *Ibid.*

Having recharacterized petitioner's claim as asserting a regulatory taking, the court of appeals affirmed its dismissal as unripe. App., *infra*, 14a. The

court stated that such a claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 8a (quoting *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985)). Because petitioner had not exhausted a request for an incidental-take permit, the court considered the claim to be unripe. *Id.* at 14a.

5. The Federal Circuit denied rehearing en banc. App., *infra*, 41a-43a.

REASONS FOR GRANTING THE PETITION

Petitioner has a conceded state-law property right to divert up to 144,630 acre-feet of water each year for its own use. The United States prefers that petitioner's water be repurposed—to further federal policy under the Endangered Species Act. To that end, the government leveraged the threat of civil and even criminal liability to force petitioner to cede a significant part of its water rights, commandeering more than 16 *billion* gallons of water that petitioner will never get back. But the Federal Circuit held that petitioner cannot assert a physical-takings claim. Instead, the court diverted petitioner's claim down the *regulatory*-takings branch governed by *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). In the decision below—now controlling precedent for all claims brought against the United States in the Court of Federal Claims—a water-rights holder can bring a physical-takings claim only if the United States takes *all* of the water that person has a right to use or commands the return of water already within the person's possession.

That result and reasoning are irreconcilable with the Takings Clause and this Court's precedent. The Court has recently reiterated that the Clause requires the payment of just compensation when "the government has physically taken property for itself or someone else—by whatever means." *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 149 (2021). In a trilogy of cases, the Court also held that government actions reallocating water to its own use were physical appropriations of another's right to "the use of the water" that required the payment of just compensation. *International Paper Co.* v. *United States*, 282 U.S. 399, 407 (1931); see *Dugan* v. *Rank*, 372 U.S. 609, 625 (1963); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 753 (1950). First principles that the Court has reinforced and takings decisions from the water-rights context point in the same direction: An order to surrender water for a public use should be analyzed as a physical taking.

None of the Federal Circuit's attempts to escape the physical-takings framework has any foothold in law or logic, and each is at war with this Court's decisions. The court of appeals opined that a physical taking requires a total deprivation of petitioner's water rights. But the "size of an appropriation * * * bears only on the *amount* of compensation," not on whether a physical taking occurred at all. *Cedar Point*, 594 U.S. at 153 (emphasis added). The court suggested that petitioner has no vested property right unless and until it has diverted particular molecules of water. But after acquiring its license and permit, petitioner maintains a "vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever." *Arizona* v. *California*, 283 U.S. 423, 459 (1931). And the court dismissed *International Paper*, *Gerlach*, and *Dugan* as outdated relics that predated

Penn Central's purported epiphany and did not arise from regulations. But this Court's historical decisions "safeguar[d] the basic property rights that help preserve individual liberty," no matter the "complexities of modern society" and the administrative state. *Cedar Point*, 594 U.S. at 158.

The question presented also warrants this Court's review. Water rights hold unsurpassed practical importance and represent a substantial subset of physical-takings litigation against the United States. Because the Federal Circuit has exclusive appellate jurisdiction over claims seeking more than $10,000 in just compensation from the United States, the decision below further invites manipulation of all kinds of property rights in the Court of Federal Claims. And this petition is an ideal vehicle to correct the court of appeals' departures from this Court's decisions. The Court should grant the petition, reverse the judgment below, and allow petitioner to proceed on its physical-takings claim.

I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS

For almost a century, this Court has treated government appropriations of the right to use water as a physical taking requiring the payment of just compensation. The Court also has recently and repeatedly rejected artificial limits on the physical-takings doctrine—just as it has rejected other contrived efforts to cabin the Takings Clause. But the Federal Circuit dusted off the forbidden playbook, refusing to recognize petitioner's physical-takings claim here because the United States took only *some* of petitioner's water rights, commandeered that water before it reached petitioner, and acted through a regulatory mandate instead of an eminent-domain proceeding. At every turn,

that reasoning defies this Court's decisions interpreting the Takings Clause.

A. The United States' Expropriation Of Petitioner's Right To Use Water Is A Physical Taking

When the government appropriates property for itself, that action is a physical taking, which triggers a categorical mandate under the Takings Clause to pay just compensation. The action here—an order demanding that petitioner surrender water that it has a legal right to use—is a physical taking under this Court's decisions.

1. The Takings Clause requires the United States to pay "just compensation" when it "take[s]" "private property," U.S. Const. Amend. V, including property owned by state and local entities, *e.g.*, *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941). By and large, "the property rights protected by the Takings Clause are creatures of state law." *Cedar Point*, 594 U.S. at 155. This Court also considers "'traditional property law principles,' plus historical practice and this Court's precedents," but primarily to prevent governments from circumventing the Takings Clause by changing the law to erase established rights. *Tyler* v. *Hennepin County*, 598 U.S. 631, 638 (2023) (citation omitted).

This Court has distinguished between physical and regulatory takings. The Takings Clause's traditional core is its just-compensation mandate for physical takings: "'direct appropriation' of property" and "the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (quoting *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871), and

Transportation Co. v. *Chicago*, 99 U.S. 635, 642 (1879)). The Court has long recognized that the Clause's protection extends beyond physical takings and also requires just compensation when the government does not take property but imposes a burden on its use through "regulation" that "goes too far." *Cedar Point*, 594 U.S. at 148 (quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922)). For that zone of additional protection against regulatory takings, the Court has applied a more "flexible" test that "balanc[es] factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." *Ibid.* (citing *Penn Central*, 438 U.S. at 124). But that context-sensitive approach for regulatory takings does not dilute the just-compensation guarantee for physical takings.

In *Cedar Point*, this Court explained how to categorize government interference with property rights as a physical or regulatory taking. A physical taking occurs when the government "appropriat[es] private property for itself or a third party." 594 U.S. at 148. Examples include the formal condemnation of property, the total or partial occupation of property, physical invasions of property, and dispossession of property. *Id.* at 147-152. In *Horne* v. *Department of Agriculture*, 576 U.S. 351 (2015), for example, the United States physically took raisins by requiring growers to set aside a portion of their crop subject to government control, regardless of whether the United States acquired actual possession of the raisins. *Id.* at 361-362. By contrast, regulatory takings governed by *Penn Central* arise from "regulations that restrict an owner's ability to use his own property." *Cedar Point*, 594 U.S. at 148.

When "the government has physically taken property for itself or someone else," this Court applies a "simple, *per se* rule: The government must pay for what it takes." *Cedar Point*, 594 U.S. at 148-149. The government can defend against paying just compensation only by establishing that its action was "consistent with longstanding background restrictions on property rights." *Id.* at 160. That inquiry is not an exception to the Takings Clause; it is instead an application of the principle that the government does not "*take* a property interest when it merely asserts a 'preexisting limitation.'" *Ibid.* (quoting *Lucas*, 505 U.S. at 1028-1029) (emphasis added).

2. Petitioner alleged a physical taking under this Court's decisions. The United States has never disputed that petitioner "acquired a valid, appropriative property right in the beneficial use of" up to 144,630 acre-feet of water per year. App., *infra*, 9a. That right was "fixed in quantity" by California law. *Colorado* v. *New Mexico*, 459 U.S. 176, 179 n.4 (1982). Petitioner already received less than its full legal entitlement because of limited water levels in the river. C.A. App. 25-26. As a result of the government's challenged action, petitioner now gets even less: The United States has asserted a priority to use the water under the Endangered Species Act, forcing petitioner to surrender part of its share. Petitioner was required to plead and prove no more.

This Court has long held that the United States physically takes water rights by reallocating water away from its rightful owner, including through:

- a wartime requisition order to a power plant for water that was owed to a mill by contract, *International Paper*, 282 U.S. at 407-408;

- construction of a dam that deprived landowners of floodwaters to which they had a right under state law, *Gerlach*, 339 U.S. at 752-755; and
- upstream diversion of water at a dam that "entail[ed] a taking of water rights below the dam," *Dugan*, 372 U.S. at 623.

Those decisions establish a physical taking on the face of petitioner's complaint. In reallocating some of petitioner's physical water for federal purposes, the United States imposed a "servitude" on petitioner's property right to use that same water. *Dugan*, 372 U.S. at 625 (citation omitted). That is a classic physical taking. "[I]t is hard to see what more the Government could do to take the use." *International Paper*, 282 U.S. at 407. Whatever justification the United States had to invoke the Endangered Species Act, that public use could justify only "appropriation" paired with just compensation—not "expropriation." *Gerlach*, 339 U.S. at 753.

Cedar Point confirms that petitioner's claim asserts a physical taking, not a regulatory taking. By repurposing water that petitioner was otherwise entitled to withdraw and use, the United States "has physically taken property for itself" and has not merely regulated petitioner's "ability to use [its] own property." 594 U.S. at 149. The government did far more than regulate petitioner's use of the water. It prevented petitioner from taking possession of the water in the first place and instead redirected the water to the public use of promoting the migration of steelhead trout. App., *infra*, 25a. Just as the United States could not issue an uncompensated mandate that raisin growers surrender a portion of their produce to a federal program, *Horne*, 576 U.S. at 361-362, it cannot issue an uncompensated mandate that petitioner dedicate a

portion of its water to a public purpose. Petitioner is never getting that water back, so the United States must pay for what it took.

Nor has the United States ever invoked a murky "background restrictio[n]" to blur petitioner's appropriative rights. *Cedar Point*, 594 U.S. at 160. Although the Court has held that the United States can claim water under its "reserved rights" as "'necessary for the beneficial uses of [federal] government property'" and under its "navigation servitude," *California* v. *United States*, 438 U.S. 645, 662 (1978) (quoting *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899)), the government never contended that either exception applies here. This Court has refused, moreover, to permit the United States to "pervert its navigation servitude into a right to destroy [water] rights." *Gerlach*, 339 U.S. at 737; see, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 180 (1979) (requiring just compensation for imposition of navigational servitude beyond traditional scope).

In short, petitioner alleged a physical taking of its water rights under this Court's decisions. Review is necessary to ensure that the courthouse doors remain open to petitioner and countless other people who possess water rights across the country.

B. The Federal Circuit Flouted *Cedar Point* For Physical Takings Of Water Rights

In attempting to circumvent this Court's water-rights decisions in *International Paper*, *Gerlach*, and *Dugan*, the Federal Circuit ran headlong into *Cedar Point*. It posited several purported bases to distinguish those precedents and deny a physical taking here, but none can be reconciled with this Court's framework for physical takings. Its published decision now threatens

to render *Cedar Point* meaningless for water-rights claims against the United States.

1. The Federal Circuit held that a physical taking would occur if the United States "*completely* cut off [petitioner's] access to the water," but not where (as here) the United States appropriated only *part* of petitioner's water rights. App., *infra*, 11a (emphasis added). Thus, even though the government requisitioned nearly 50,000 acre-feet of water from 2017 to 2021, the court held that no physical taking occurred because petitioner still got some fraction of the water that it was entitled to divert.

That total-versus-partial distinction contravenes *Cedar Point*. There, this Court explained that "the size of an appropriation * * * bears only on the amount of compensation," not on the existence of a physical taking. 594 U.S. at 153 (citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-437 (1982)). Here, too, the amount of water that the United States commandeered from petitioner affects only how much the federal government must pay, not the threshold question whether the government's appropriation should be analyzed as a physical or regulatory taking. The government's "formal demand" that petitioner dedicate to a public use a sizable "percentage" of water that it was entitled to divert (approximately 32%) is a *per se* taking. *Horne*, 576 U.S. at 362; see *id.* at 355 (holding that United States had to pay just compensation for requiring growers to set aside 47% and 30% of their raisin crops in successive years).

The Federal Circuit's effort to confine the physical-takings framework to total takings also defies this Court's water-rights precedent. The court of appeals noted that *International Paper* involved a complete deprivation of water. App., *infra*, 10a-11a. But *Inter-*

national Paper did not hold that the Takings Clause *requires* a complete taking. To the contrary, *Dugan* later held that the "*partial* taking of water rights" likewise triggers the United States' obligation to pay just compensation. 372 U.S. at 625 (emphasis added). The "extent" of the taking goes only to the amount of compensation owed, not to the existence of a taking. *Id.* at 626; see *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 273 n.1 (1955) ("A partial taking is compensable." (citing *Gerlach*, 339 U.S. at 739)). That was the law long before the Court confirmed the principle in *Cedar Point*. Now it is a dead letter for claims against the United States under the decision below.

The court of appeals' approach is also unworkable and will invite government manipulation of property rights. Determining whether all of a water-rights holder's property has been taken requires identifying the denominator. Is the unit of analysis the set of rights conferred by each separate legal instrument for each body of water, or all water the property owner can access in the aggregate? And is the relevant window a day, a year, or a decade? The Federal Circuit's arbitrary all-or-nothing approach incentivizes the government to invent ways to spin massive expropriation as less than *all* one has to give.

2. The Federal Circuit also held that a government order to *return* water that was already diverted is a physical taking but that a government order to give up water that a person is legally entitled to divert is a regulatory taking. App., *infra*, 11a-13a. That made-to-order, before-or-after distinction likewise has no basis in this Court's physical-takings framework or the cases addressing takings of water rights.

This Court has never suggested that the categorical mandate to pay just compensation for the physical

appropriation of property depends on whether the government requires an owner to hand over his property or instead intercepts the property on the way to its owner. In *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), for example, this Court held that the Takings Clause required the government to pay just compensation for taking the interest that was earned on a court-administered interpleader fund but owed to creditors whose claims would later be determined. *Id.* at 161-164. That the funds were "held temporarily by the court" instead of being in their ultimate owners' possession made no difference to the analysis. *Id.* at 164; see, *e.g.*, *Tyler*, 598 U.S. at 639 (holding that government must return excess value of property to taxpayer after sale).

The Federal Circuit's before-or-after distinction is also insupportable as a matter of text and common sense. The guarantee of just compensation applies whenever the government takes property for a public use—whether the government pries property from a person's fingers or intercepts property he owns while on the way to him. U.S. Const. Amend. V. Nor is there any reason that the Takings Clause should turn on the happenstance of whether the United States uses postal agents to seize a check in the mail, instructs the sender to change the mailing address to the Treasury, or orders the recipient to hand over the check after opening the envelope. The government cannot avoid physical-takings liability by intercepting property before it reaches the hands of the person with a legal entitlement to it.

Water is no exception to that rule. In *International Paper*, the United States requisitioned water from the plaintiff by ordering a third party (a power company) to redirect the water before it reached the

plaintiff. 282 U.S. at 405-406. In *Gerlach*, the United States took water rights by building a dam that prevented flooding from occurring in the first place, leaving the plaintiffs' lands "parched" and "barren." 339 U.S. at 730. And in *Dugan*, the United States had to pay just compensation for actions "occur[ring] upstream" that deprived downstream users of water that they were entitled to use. 372 U.S. at 625. Each case refutes the court of appeals' suggestion that the government takes water rights only by requiring the plaintiff to hand over actual water molecules in its possession.

The court of appeals suggested that appropriative rights, in contrast to riparian rights, "vest" only once the owner has "physically diverted water" on a particular occasion. App., *infra*, 13a. That contrived limitation has no basis in "state law" or "'traditional property law principles.'" *Tyler*, 598 U.S. at 638 (citation omitted). Under California law, an appropriative right "consists not so much of the fluid itself as the advantage of its use." *Eddy* v. *Simpson*, 3 Cal. 249, 252 (1853); see Cal. Water Code § 102. Petitioner's rights to divert up to 144,630 acre-feet annually thus "vested" under California law when it "*acquired*" them under its license and permit, not when each drop of water reached petitioner's canal and facilities. *United States* v. *State Water Resources Control Board*, 182 Cal. App. 3d 82, 101 (1986) (emphasis added). An appropriative right is a "vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever." *Arizona*, 283 U.S. at 459; see *Wyoming* v. *Colorado*, 259 U.S. 419, 459 (1922) (appropriative right creates a "*continuing* right to divert and use the water" (emphasis added)). The United States has physically taken that right regardless of

whether it commandeers water before it reaches its owner or afterward.

The court of appeals' contrary conclusion squarely conflicts with *Dugan*. The court asserted that *Dugan* addressed only riparian rights. App., *infra*, 13a. But the plaintiffs in *Dugan* were holders of "riparian as well as other types of water rights," including "appropriative" rights. 372 U.S. at 614, 619. The United States itself told this Court that "[t]he present case is concerned with the riparian and appropriative rights" in the San Joaquin River. Pet. Br. at 7, *Dugan*, *supra* (No. 62-31). And the evenhanded treatment of water rights in *Dugan* honors the longstanding "federalism" tenet that "each State 'may determine for itself whether'" to grant appropriative or riparian rights without any federal thumb on the scales. *California* v. *United States*, 438 U.S. 645, 648, 663 (1978) (citation omitted). The court of appeals' holding that appropriative rights are uniquely vulnerable to federal expropriation upends the settled federal/state balance in water law and jeopardizes state-law water rights throughout the arid West.

3. The Federal Circuit suggested that *International Paper*, *Gerlach*, and *Dugan* can be disregarded because they did "not acknowledge any distinction between physical and regulatory takings" and predated this Court's articulation of the regulatory-takings framework in *Penn Central*. App., *infra*, 13a. That effort to dilute takings doctrine also defies *Cedar Point*.

Cedar Point reaffirmed that "*Penn Central* has no place" in addressing "physical appropriation[s] of property." 594 U.S. at 149. The Court repudiated an attempt to reconceptualize retroactively earlier cases involving physical invasions as regulatory takings.

Id. at 158 (citing *United States* v. *Causby*, 328 U.S. 256 (1946), and *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327 (1922)). *Cedar Point* shielded traditional takings doctrine from *Penn Central* incursions because, whatever one thinks of regulatory takings, the "physical takings jurisprudence is 'as old as the Republic.'" *Id.* at 147 (quoting *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002)).

The court of appeals attempted the same forbidden revisionist relabeling of past cases. App., *infra*, 13a. *Dugan* analogized the "[i]nterference with or partial taking of water rights" to the "interference or partial taking of air space over land" in *Causby* and *Portsmouth*. 372 U.S. at 625. The takeaway is unmistakable: Appropriations of water rights, like invasions of the right to exclude, remain physical takings that categorically require just compensation. *Ibid.* "[T]he complexities of modern society" do not undermine such historically grounded takings decisions but instead "only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty." *Cedar Point*, 594 U.S. at 158.

4. Finally, the Federal Circuit treated this case differently because the taking arose from regulatory action under the Endangered Species Act, while *International Paper*, *Gerlach*, and *Dugan* "did not arise from a regulation." App., *infra*, 13a. But the "essential question is not, as the [Federal] Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)." *Cedar Point*, 594 U.S. at 149. What matters is "whether the government has physically taken property for itself or someone else—by whatever means." *Ibid.* As this Court recently made

clear, the Takings Clause "constrains the government without any distinction between legislation and other official acts." *Sheetz* v. *El Dorado County*, 601 U.S. 267, 277 (2024).

The court of appeals tried to dress up the taking in regulatory-speak as a "nonpossessory government activity merely requiring that more Santa Clara River water, whether flown through the fish ladder or not, remains in the river." App., *infra*, 12a. The United States, however, cannot escape paying just compensation for water it requisitions by sidestepping the procedural safeguards it must observe in "formally condemn[ing]" property. *Cedar Point*, 594 U.S. at 147. Under the Takings Clause, "property rights 'cannot be so easily manipulated.'" *Id.* at 155 (quoting *Horne*, 576 U.S. at 365). The United States has asserted a "servitude" for the public use of water to facilitate fish migration even though petitioner possesses superior rights to the water under California law. *Dugan*, 372 U.S. at 625 (citation omitted). Through that action, the United States physically appropriated a sizable portion of petitioner's water rights. That the government self-servingly refuses to acknowledge that it is engaged in physical appropriation only adds insult to property owners' injury.

That conclusion respects the proper function of the Takings Clause. Congress enacted the Endangered Species Act "to halt and reverse the trend toward species extinction, whatever the cost." *TVA* v. *Hill*, 437 U.S. 153, 184 (1978). That was Congress's choice to make. But long before legislation to safeguard animal species, the People made the foundational choice in the Bill of Rights who must bear that cost: the United States, not property owners like petitioner.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND RECURRING

The Federal Circuit's decision exposes water rights to uncompensated partial takings, so long as the government manages to intercept water before it reaches its rightful owner. Because the Federal Circuit has exclusive appellate jurisdiction over the Court of Federal Claims, the decision below also promises to have spillover effects across all kinds of physical-takings claims against the United States. Those weighty legal and practical implications warrant this Court's intervention.

A. The question presented is exceptionally important. W.H. Auden was being realistic (if unromantic) in observing, "Thousands have lived without love, not one without water." States developed and then reaffirmed appropriative property rights to encourage much-needed investments "in long-term improvements" that capture water and allow people to survive in the arid West. Richard Epstein, *Property Rights in Water, Spectrum, and Minerals*, 86 U. Colo. L. Rev. 389, 402 (2015). As the United States commandeers ever-scarcer water to support the ever-growing demand of various federal priorities, the protections of the Takings Clause become even more vital.

Because the United States (like everyone) needs water for itself, the question presented also implicates a recurring fact pattern. The Federal Circuit routinely hears claims that the United States has taken water rights. *E.g.*, *City of Fresno* v. *United States*, 124 F.4th 876, 896-897 (Fed. Cir. 2024), petition for cert. pending, No. 25-266 (filed Sept. 5, 2025); *Baley* v. *United States*, 942 F.3d 1312, 1331 (Fed. Cir. 2019); *Estate of Hage* v. *United States*, 687 F.3d 1281, 1288-1290 (Fed. Cir. 2012); *CRV Enterprises, Inc.* v. *United States*, 626 F.3d

1241, 1246-1248 (Fed. Cir. 2010); *Casitas Municipal Water District* v. *United States*, 543 F.3d 1276, 1290 (Fed. Cir. 2008); *Washoe County* v. *United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003). Without this Court's review, the decision below will supply the framework for a host of claims that the United States has taken water rights without paying just compensation.

The contrived limitations that the Federal Circuit adopted under the Takings Clause already are distorting physical-takings claims against the United States. Plaintiffs are now pigeonholed into seeking just compensation only if the United States "completely cut[s] off [the plaintiffs'] access to water." *Russell & Elizabeth Reid Family Trust* v. *United States*, — Fed. Cl. —, 2025 WL 2527572, at *9 (Sept. 3, 2025). The United States has wielded the decision below aggressively in arguing that a plaintiff may seek just compensation only when required to return "the 'particular molecules of water' that reach" the plaintiff's property. *Id.* at *6. And that case is just the tip of the iceberg—for both the cases to come and the ones that will never be filed when the United States takes some, but not all, of the water that a person is entitled to divert.

Shunting such claims into the regulatory-takings framework is no solution at all. As an initial matter, water rights should not be "balanced away" under *Penn Central* when the government appropriates water for its own use. *Cedar Point*, 594 U.S. at 158. But the consequences are even worse because many will be locked entirely out of court while permit applications remain in regulatory limbo. As this Court knows well, similar permitting processes "can be arduous,

expensive, and long." *Army Corps of Engineers* v. *Hawkes Co.*, 578 U.S. 590, 601 (2016).

Here, for example, the Service noted that petitioner had expended "eight years of effort" to obtain an incidental-take permit as of 2016. C.A. App. 54. Yet the completion of that process was then (and remains now) "years off." *Ibid.* Conditioning access to court on the vagaries of the serpentine permitting process is yet another attempt to "relegat[e] the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights." *Knick* v. *Township of Scott*, 588 U.S. 180, 189 (2019) (citation omitted). Whether or not that approach is proper for regulatory-takings claims, it is intolerable to tie up traditional physical-takings claims indefinitely in agency red tape.

The Federal Circuit lost sight of the principle that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Granting review and holding that petitioner pleaded a physical taking of its water rights would ensure that the United States pays compensation to petitioner and numerous others with similar rights—and perhaps thinks twice about taking water rights in the first place.

B. The Federal Circuit's workarounds to *Cedar Point* also invite abuse of property rights by the United States across the full range of physical takings. Plaintiffs seeking more than $10,000 in "just compensation under the Takings Clause" must bring their claims in "the Court of Federal Claims in the first instance" outside of rare circumstances where "Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Horne* v. *Department*

of Agriculture, 569 U.S. 513, 527 (2013) (citation omitted); see 28 U.S.C. § 1491(a)(1). The Federal Circuit, in turn, has exclusive appellate jurisdiction over decisions of the Court of Federal Claims. 28 U.S.C. § 1295(a)(3). Under the decision below, the United States has a new array of arguments to evade paying just compensation under the Takings Clause.

The message sent by the decision below is clear: Be thankful when the government leaves you anything at all. For example, the government can now walk right up to the line of taking all of a person's property interest—say, 75% of water that someone had a right to use, 90% of wheat that someone had a right to harvest, or 99% of oil that someone had a right to extract—so long as it does not "completely cut off [the person's] access" to the property. App., *infra*, 11a. Such percentage games might be de rigueur under *Penn Central*. But they should "ha[ve] no place" when it comes to physical takings. *Cedar Point*, 594 U.S. at 149.

Because the Federal Circuit's rule also depends on whether the government intercepts property before a person can exercise his rights or instead requires the "return" of property, the government can avoid the physical-takings framework merely by planning its appropriations in advance and commandeering property before it is received by its owner. App., *infra*, 11a. If a person steals a package from a delivery truck just as it arrives at its destination, a federal prosecutor would call that theft. *E.g.*, 18 U.S.C. § 659. But in the Federal Circuit's view, the federal government can do the same thing without even engaging in a physical taking. This Court has stressed that "property rights 'cannot be so easily manipulated.'" *Cedar Point*, 594 U.S. at 155 (quoting *Horne*, 576 U.S. at 365). But even

minimal bureaucratic foresight now will allow the United States to sidestep the Takings Clause.

Exacerbating the injury, the Federal Circuit's decision breathes new life into long-defunct efforts to exempt the administrative state from physical-takings safeguards. The court of appeals purported to recognize that "[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation." App., *infra*, 7a (quoting *Cedar Point*, 594 U.S. at 149). But the court held only pages later that this case should be analyzed as a regulatory taking because the appropriation of water rights "ar[o]se from a regulation" under the Endangered Species Act. *Id.* at 13a. That escape hatch from *Cedar Point* should be welded shut as soon as possible.

C. This Court regularly grants review of important issues over which the Federal Circuit has exclusive nationwide jurisdiction. See, *e.g.*, *Soto* v. *United States*, 605 U.S. 360, 367 (2025) (procedures for seeking military benefits); *Feliciano* v. *Department of Transportation*, 605 U.S. 38, 44 (2025) (standard for military pay in Merit Systems Protection Board); *Thryv, Inc.* v. *Click-To-Call Technologies, LP*, 590 U.S. 45, 52 (2020) (reviewability of determinations by Patent Trial and Appeal Board). That exclusive jurisdiction stymies the development of a square circuit conflict and gives the Federal Circuit the final say until this Court intervenes.

Takings litigation is a prime example of a context where the Federal Circuit's errors will reverberate nationwide until this Court intervenes. See pp. 30-31, *supra*. Certiorari is appropriate to determine whether the Federal Circuit has properly applied this Court's decisions under the Takings Clause to claims against the United States. *E.g.*, *Arkansas Game and Fish*

Commission v. *United States*, 568 U.S. 23, 31 (2012); see also, *e.g.*, *Gerlach*, 339 U.S. at 725 (certiorari to the Court of Claims, whose appellate jurisdiction was later transferred to the Federal Circuit); *International Paper*, 282 U.S. at 399 (same). The Federal Circuit's exclusive jurisdiction over appeals from the Court of Federal Claims creates an even more pressing need to resolve the question presented correctly.

III. THIS PETITION IS AN IDEAL VEHICLE

This case offers a clean opportunity to resolve the question presented. The United States has never disputed that petitioner has a property right under its license and permit to divert and use water. App., *infra*, 9a. Nor has the United States ever disputed that petitioner would have had a right to divert and use the water that was instead reallocated to the in-stream use of facilitating steelhead trout migration. *Ibid.* And the Federal Circuit squarely resolved petitioner's argument that the United States' interference with the water rights should be analyzed as a physical rather than a regulatory taking. *Id.* at 10a-13a.

This case also vividly illustrates the harmful consequences of the Federal Circuit's departures from this Court's decisions. Petitioner's efforts to "diver[t] water" from the Santa Clara River are critical because the groundwater basins in petitioner's territory experience "'overdraft'—meaning that more water is being taken out than is replaced by natural processes." *City of San Buenaventura* v. *United Water Conservation District*, 3 Cal. 5th 1191, 1198 (2017). If petitioner does not replenish its basins, saltwater may "intru[de] into the fresh groundwater supply," making the water undrinkable and unsuitable for agriculture. *Ibid.*; see C.A. App. 25. This case demonstrates that the harms

from the Federal Circuit's rule are anything but hypothetical.

* * * * *

Fish are important, but not more so than Fifth Amendment rights. If the United States wishes to appropriate water rights for a "public use," U.S. Const. Amend. V, it can do so. But the Takings Clause guarantees that the United States must provide "just compensation" for the property rights it took from petitioner. *Ibid.* This Court should grant review and make clear that it meant what it said in *Cedar Point*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 27, 2025