No. 25-523

IN THE

Supreme Court of the United States

UNITED WATER CONSERVATION DISTRICT,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMICUS CURIAE BRIEF OF TEXAS FARM BUREAU IN SUPPORT OF PETITIONER UNITED WATER CONSERVATION DISTRICT'S PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICUS*

Texas Farm Bureau ("TFB") submits this brief on behalf of its members.[1] TFB is a Texas non-profit membership corporation committed to the advancement of agriculture and prosperity for rural Texas. TFB has approximately 482,543 member families and is associated with 205 county Farm Bureau organizations across the state. TFB and its members – many of whom own longstanding appropriative water rights throughout Texas – rely on both the United States and Texas Constitutions' protections of these vested property rights, ensuring just compensation if their property is ever taken by the government for a public use.

Water in Texas (and other western states, including California) is a very important and increasingly scarce resource for residents, farmers, and industries. Texas citizens (including the members of TFB) rely on Texas' regulatory system governing appropriative water rights for their livelihoods. Texas' consistent recognition of water use rights as vested property interests based on their permit priority date ensures that Texas has enough water for its citizens, species, and environment. This system also protects property rights.

United Water Conservation District v. United States, 133 F.4th 1050 (Fed. Cir. 2025) (the "Panel Opinion")

1. Counsel for Texas Farm Bureau authored this amicus brief in whole. Texas Farm Bureau will pay all costs incurred in the preparation and submission of the brief. No other individuals or entities other than Texas Farm Bureau have provided monetary contributions towards the preparation or submission of this brief. All parties were given timely notice pursuant to Rule 37.2.

misinterpreted California's water right laws when it stated that an appropriative water right vests only after the water right owner has diverted the water. In reaching this conclusion, the Panel Opinion disrupted this Court's established delineator between a compensable physical taking and the more nebulous legal framework for the regulatory taking of water for the government's own purposes, and in so doing entitled the United States to the use of appropriated water for a public purpose without compensation. If this Court does not grant United Water Conservation District's ("United" or "Petitioner") Petition, the Panel Opinion's new standard, which would apply nationwide, will weaken longstanding appropriative water rights and expose those water rights owners to an increasing number of uncompensated government takings. TFB urges this Court to grant United's Petition in order to affirm its jurisprudence on the physical taking of property under the Takings Clause of the United States Constitution.

SUMMARY OF ARGUMENT

This case presents an important question of property rights. The decision of the Federal Circuit in the Panel Opinion threatens to upend longstanding precedent of this Court that separates a regulatory taking under the analysis of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (applicable when regulations merely limit a person's right to use his or her property) from a physical expropriation by the government that deprives a property owner of the ability to use his or her property altogether.

The United States expropriated 49,850 acre-feet of water permitted to United for the public purpose of

aiding a fish species. Under California (and Texas) state law, surface water rights are appropriated to users by permit and, once perfected, are vested property rights. The Panel Opinion erroneously found that, despite United possessing a vested appropriative water right created under California state law, United must have already diverted the water at the time it was expropriated by the government in order for its property right to vest. 133 F.4th at 1057-58. Thus, by the government's argument, no water right holder could ever assert a takings claim for a government order compelling it not to enjoy the water to which it would otherwise be legally entitled to divert.

While water must be initially diverted and put to a beneficial use in order to vest an appropriative right, once vested in this manner, the right to use that water exists regardless of whether the water remains in the river or has already been diverted. United's property right to the use of permitted water is therefore not contingent upon whether the government expropriated it before or after United's diversion; in either event, it is wholly deprived of that property in the amount the government has ordered.

The Federal Circuit instead treated United's claim for the physical taking of its water as a regulatory taking, then dismissed that claim as unripe so long as license proceedings under the Endangered Species Act remain pending. Such a conclusion obviates the distinction between a regulatory and physical taking. As this Court has held, when the government appropriates private property for itself or a third party, it must pay for what it takes. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 148 (2021). This is true whether the taking was only partial or total, and regardless of whether the government

expropriated the water before or after it reached the water rights holder. Such workarounds of the Takings Clause are "insupportable as a matter of precedent and common sense." *Id.* at 153.

Because the Federal Circuit's holding in the Panel Opinion establishes nationwide precedent, this Court's intervention is necessary to protect water rights holders' vested property rights nationwide – including the water rights of TFB's members.

ARGUMENT

I. The Panel Opinion's incorrect analysis of California's law on appropriative water rights also imperils Texas' regulatory system governing surface water use rights.

A. Like California, Texas regulates surface water and treats perfected surface water permits as a vested property right.

Texas owns "[t]he water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state" in trust for its citizens. Tex. Water Code §§ 11.021(a), 11.0235(a).

The use of this water by Texans has long been regulated by the State. In 1840, Texas adopted the English common law riparian system. *Motl v. Boyd*, 286 S.W. 458, 465–66 (Tex. 1926). Texas continued to recognize vested common

law riparian rights in land granted from the Mexican or Spanish governments until 1913, when it passed legislation that "ceased to recognize riparian rights that were not already vested and prohibited their creation by state land patents issued after July 1, 1895." *Cummins v. Travis County Water Control and Improvement Dist. No. 17*, 175 S.W.3d 34, 44 (Tex. App.—Austin 2005, pet. denied), citing Frank F. Skillern, I Texas Water Law 69 (1992). This provision of the 1913 act remains the law today, resulting in a dual system that protects these prior riparian rights while ultimately adopting and enforcing an appropriation system. *Id*. In 1967, Texas adopted the Water Rights Adjudication Act in an effort to clarify and codify its appropriative water rights regulations. This Act "required a Texas landowner claiming a right to use the water to file a sworn statement, participate in an evidentiary hearing, and obtain a certificate of adjudication." *Id*.; *see also* Tex. Water Code §§ 11.301-341. The Water Rights Adjudication Act is now "the exclusive means by which [water] rights may be recognized" in Texas. *Id*., citing *In re Adjudication of Water Rights of Brazos III Segment,* 746 S.W.2d 207, 210 (Tex. 1988). Certificates of adjudication issued pursuant to this Act are the water permits that grant Texans the right to use surface water.

A person or entity can acquire permanent, term, and/or temporary surface water use rights by submitting a permit application to the Texas Commission on Environmental Quality ("TCEQ"), the state regulatory agency charged with regulating surface water in Texas. 30 Tex. Admin. Code § 297.43(a); Tex. Water Code § 11.121; *see also In re Adjudication of Water Rights of Brazos III Segment of Brazos River Basin*, 746 S.W.2d at 211 (holding that TCEQ retains the sole authority to grant and deny

water use permits based on its review of already existing senior appropriative water rights). These appropriative water rights are operated under the "first in time, first in right" priority system, under which older or "senior" rights are given precedence over newer or "junior" rights during a time of water shortage within the relevant river segment. Tex. Water Code § 11.027.

In Texas, appropriative rights to use State surface water are a vested property right when acquired and perfected. *Texas Water Rights Commission v. Wright*, 464 S.W.2d 642, 646-648 (Tex. 1971); *see also Lower Colorado River Authority v. Texas Dept. of Water Resources*, 689 S.W.2d 873, 874 (Tex. 1984) (holding that "unappropriated water" does not include water covered under valid water use permits); *Texas Rivers Protection Ass'n v. Texas Natural Resource Conservation Com'n*, 910 S.W.2d 147, 155-156 (Tex. App.—Austin 1995, writ denied) (holding that an appropriative water permit projecting future beneficial uses was valid because the permit owner's infrastructure updates, nearby competitor interest, and population growth showed that the permit owner would likely implement the beneficial use projections). Once the permitted water has been diverted and put to beneficial use, the appropriative right is, and remains, a vested property right. *Clark v. Briscoe Irr. Co.*, 200 S.W.2d 674, 676 (Tex. Civ. App.—1947, no writ). Riparian water rights are also vested property rights under Texas law. *Board of Water Engineers v. McKnight*, 229 S.W. 301, 304 (Tex. 1921).

A vested water right owner's property interest focuses on "…the amount specifically appropriated but also to the amount which is being or can be beneficially used for the

purposes specified in the appropriation…." Tex. Water Code §§ 11.025, 11.040(a) (categorizing a permanent water right as an easement which passes with land title, and which may be recorded in the same manner as any other instrument relating to a conveyance of land); *see also Wilson v. New Braunfels Utilities*, 536 S.W.3d 5, 13-14 (Tex. App.–Austin 2016, pet dism'd) (holding that an owner of a vested appropriative water right possesses title to use that water). Thus, while the State of Texas owns the surface water of the state, a permit to appropriate that water is itself a vested property right once it is initially put to beneficial use. Tex. Water Code § 11.025-026.

B. Texas appropriative water right holders can sell, lease, or transfer those rights; and the holders generally own the appropriative water rights in perpetuity unless they are cancelled or forfeited.

A Texas appropriative water right owner can sell, lease, or transfer that right to other people or entities. Tex. Water Code §§ 11.040, 11.0275; *see also Graham v. Kuzmich*, 876 S.W.2d 446, 448-449 (Tex. App.—Corpus Christi-Edinburg 1994, no pet.).

Permanent water right owners generally retain those property rights in perpetuity until they are: (1) cancelled after ten continuous years of nonuse, or (2) forfeited after three successive years of willful abandonment. *See* Tex. Water Code §§ 11.172, 11.030.

TFB, like the Petitioner, is concerned that the Panel Opinion's application of the regulatory rather than physical takings test to the diversion of a vested appropriative

water right by the United States government for its desired uses of that water deprives Petitioner of its property rights without compensation in violation of the Takings Clause of the United States Constitution. Because Texas law treating appropriative permits as a property right is similar to California law, TFB urges this Court to grant the Petition to affirm its longstanding precedents governing the physical taking of property.

II. The Panel Opinion's incorrect categorization of the government's actions as a regulatory taking conflicts with this Court's precedent on physical takings of property.

The Panel Opinion created an impossibly stringent physical taking standard where the government must compensate appropriative water right owners when it: (a) expropriates *all* permitted water and/or (b) demands the owner to return water after the owner's diversion. This standard is not supported by this Court's existing precedents and should be rejected.

A. The government's diversion requirement permanently deprived the Petitioner from access to water to which Petitioner had a vested property right.

Property rights that are protected by the Takings Clause of the United States Constitution are "creatures of state law." *Cedar Point*, 594 U.S. at 155. As discussed above, in California as in Texas, a perfected water right is a vested property right. *Wright*, 464 S.W.2d at 646-648; *Arizona* v. *California*, 283 U.S. 423, 459 (1931). That is true for both appropriative and riparian water rights. *Board*

of Water Engineers, 229 S.W. at 304; *Dugan*, 372 U.S. at 614, 619. The Panel Opinion therefore inappropriately distinguishes cases such as *Dugan v. Rank*, 372 U.S. 609 (1963) on the basis that they involved riparian and not appropriative rights. Panel Opinion, 133 F.4th at 1058. That is a distinction without a difference for the purpose of Takings Clause analysis. After acquiring its license and permit under state law, the Petitioner holds 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). In either the appropriative or riparian context, the United States cannot escape the physical takings framework when it has ordered a water rights holder to surrender water for a public purpose.

First, the Panel Opinion's attempt to shunt its analysis to a regulatory rather than physical taking is misplaced. "A government action that physically appropriates property is no less a physical taking because it arises from a regulation." *Cedar Point*, 594 U.S. at 149. The essential question thus is not whether the government action "comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)," but whether it has "physically taken property for itself or someone else – by whatever means – or has instead restricted a property owner's ability to use his own property." *Id*, citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002). The Panel Opinion indeed cloaks the government's actions in the garb of a regulation, calling the diversion of United's water right for the benefit of a fish species as merely a "nonpossessory government activity merely requiring that more Santa Clara River water . . . remains in the river." Panel Opinion,

133 F.4th at 1057. However, by asserting a servitude that commits a water right held by United to another public purpose, the government physically appropriated those water rights, which "cannot be so easily manipulated" by simply recategorizing the government's appropriation as a regulatory action. *Dugan*, 372 U.S. at 625; *Cedar Point*, 594 U.S. at 155.

The Panel Opinion's holding that the United States' water diversion requirement for Petitioner was not a physical taking directly conflicts with longstanding precedent from both this Court and the Federal Circuit Court about compensable physical taking requirements for water use rights. This Court has held that the government's partial appropriation of private property constitutes a physical taking requiring adequate compensation due to "...the inability of the owner to make a reasonable return on his property…." *Penn Central*, 438 U.S. at 149; *Dugan,* 372 U.S. at 625-626 (holding that the taking of a water right occurs if "any part" of the claimed water right is invaded).

As discussed further below, the Federal Circuit Court has also repeatedly held that even a partial diversion of water constitutes a physical taking by the government requiring compensation because the owner's "…right to use that water, is forever gone." *Casitas Mun. Water Dist. v. U.S.*, 543 F.3d 1276, 1288-1296 (Fed. Cir. 2008) (holding that the government's partial diversion of an appropriative water right owner's water via the installation of a fish ladder to preserve an endangered species constituted a physical taking requiring compensation); *see also Klamath Irrigation v. United States*, 129 Fed. Cl. 722, 734-735 (Fed. Cir. 2016) (holding that the government's partial

retention of water to protect fish species constituted a physical taking requiring compensation to the water use right owners).

To be clear, preventing the diversion of water held under an appropriative right is just as much of a physical taking as redirecting already diverted water. The Panel Opinion erroneously concluded that an appropriator must have already "physically diverted water" for its property right to vest and become subject to a physical taking. Panel Opinion, 133 F.4th at 1058. California law provides that a usufructuary right to the use of water through an appropriative right is itself a vested private property right. *Thayer v. California Dev. Co.*, 164 Cal. 117, 129 (1912). Crucially, the Panel Opinion's reasoning that a physical taking occurs only by the government commandeering already-diverted water is undercut by this Court and the Federal Circuit's prior holdings. See *International Paper Company v. United States*, 282 U.S. 399, 405–06 (1931) (Government's actions to "cut off the water being taken" before it was diverted, in order to increase another use of that water, constituted a taking); *Washoe Cnty. v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003) ("[C]ourts have recognized a physical taking where the government has … decreased the amount of water accessible by the owner of the water rights.").

Moreover, *International Paper* concluded that, as Respondent does in the present matter, redirecting water from the owner's use to one "deemed more useful" by the government is no less a taking that directly expropriating it. *International Paper*, 282 U.S. at 408. Thus, an agency of the federal government determining that water appropriated to a water district, or Texas

farmers for that matter, is necessary for the "habitat of an endangered species" is a public use of that water that requires compensation to the rights holder. *Casitas*, 543 F.3d at 1292.

B. Taking just a portion of an appropriative water right is still a compensable physical taking.

The Panel Opinion distinguished *International Paper* on the basis that, in that case, the government "completely cut off" the claimant's access to its water, while here, the government claims only a portion of United's water right. Panel Opinion, 133 F.4th at 1057. As the Federal Circuit held in *Casitas*, it does not matter that the government only commandeered *some* of the water rights holder's water, because the water that the government appropriated was "gone forever." *Casitas*, 543 F.3d at 1294, n.5.

As discussed above, this Court has held that the taking of any part of a water right constitutes a taking. *Dugan*, 372 U.S. at 623. As held in *Dugan*, interference with or even the *partial taking* of water rights must be analogized to the partial taking of air space over land. *Id.* at 625. Thus, even a small "permanent physical occupation" of property is a per se taking. *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982). That is because the extent of the taking concerns only the amount of compensation owed, not the existence of the taking itself. *Dugan*, 372 U.S. at 626; *see also Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 273 n.1 (1955) ("A partial taking is compensable.").

It is irrelevant whether the government has redirected only some but not all of United's water right, because that

specific water is forever gone, as it has been dedicated to a public use. Such action is a physical taking that requires compensation, and for this additional reason, this Court should grant the Petition to correct the decision of the Federal Circuit.

CONCLUSION

The United States government has numerous obligations under federal law, including the Endangered Species Act. However, the Fifth Amendment to the United States Constitution requires that private property taken for such public purposes must be justly compensated. Appropriated surface water rights of Texans such as TFB's members are vested property rights upon perfection, regardless of whether the government commandeers that water for another purpose prior to or after diversion of the water. This is a physical taking that must be justly compensated. This Court should therefore grant the Petition in order to affirm its physical takings jurisprudence of *Cedar Point* and its progeny, and to avoid the confusion that would ensue with the panel's creation of a conflicting standard.

Respectfully submitted,

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