No. 25-523

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

BRIEF OF *AMICI CURIAE* WESTERN GROWERS ASSOCIATION, CALIFORNIA COTTON GINNERS AND GROWERS ASSOCIATION, WESTERN TREE NUT ASSOCIATION, CALIFORNIA CITRUS MUTUAL, CALIFORNIA FRESH FRUIT ASSOCIATION, AMERICAN PISTACHIO GROWERS, THE CALIFORNIA FARM BUREAU FEDERATION, IN SUPPORT OF PETITIONER

Ryan R. Waterman
Counsel of Record
BROWNSTEIN HYATT FARBER SCHRECK, LLP
225 Broadway, Suite 1670
San Diego, CA 92101
Telephone: 619.702.7569
Email:rwaterman@bhfs.com

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Scott S. Slater
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
1020 State Street
Santa Barbara, CA 93101
Telephone: 805.963.7000
Email: sslater@bhfs.com

Mary C. Loum
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
1415 L Street, Suite 800
Sacramento, CA 95814
Telephone: 916.594.9700
Email: mloum@bhfs.com

Counsel for Amici Curiae Western Growers Association, California Cotton Ginners and Growers Association, Western Tree Nut Association, California Citrus Mutual, California Fresh Fruit Association, American Pistachio Growers, The California Farm Bureau Federation

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STATEMENT OF INTEREST

Amici curiae represent various organizations involved in agriculture enterprises throughout California and other Western States.[1]

Founded in 1926, Western Growers Association (WGA) is a non-profit organization representing local and family farmers in Arizona, California, Colorado, and New Mexico. Its members grow roughly half the fresh produce in the United States and represent 90% of the growers, shippers and packers of fresh produce, fruit and nuts in California and Arizona. Of WGA's 3,000 members, 2,200 are Californians. WGA has a long-standing practice of advocating on matters generally affecting its members.

The California Cotton Ginners and Growers Association (CCGGA) is a voluntary dues trade association representing cotton gins and cotton growers throughout the state of California on regulatory and legislative issues. While membership is voluntary, CCGGA currently represents 100% of the cotton gins and cotton growers in the state, which includes 15 operating cotton gins and approximately 300 cotton growers.

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[1] No counsel for any party authored this brief in whole or in part, nor did any such counsel or party make any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, *amici curiae* provided timely notice to counsel of record for all parties of *amici*'s intent to file this brief.

The Western Tree Nut Association (WTNA) is a voluntary dues trade association representing more than 200 tree nut growers, hullers and processors of almonds, pecans, pistachios and walnuts throughout California on regulatory and legislative issues.

California Citrus Mutual (California Citrus) was founded by growers in 1977 as a non-profit trade association. California Citrus works to protect and enhance the viability of California's citrus growers. California Citrus' goal is to credibly represent the needs of California's citrus growers to State and Federal elected officials and policymakers, foster communication and cooperation between all segments of the citrus industry, and deliver relevant, timely and unbiased information to the membership.

Established in 1936, the California Fresh Fruit Association (CFFA) is a voluntary public policy association that represents growers, packers, and shippers of California table grape, blueberry, kiwi, pomegranate and deciduous tree fruit communities. CFFA serves as a public policy representative for its members on issues at both the state and federal levels.

American Pistachio Growers is a non-profit trade association representing over 800 grower members in California, Arizona, and New Mexico with the shared goal of increasing global awareness of nutritious, American-grown pistachios. These entities represent an industry that feeds our nation, and their members have a vital interest in the issues presented in this case.

The California Farm Bureau Federation (Farm Bureau) is a nongovernmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the State of California and to find solutions to the problems of the farm, the farm home, and the rural community. The Farm Bureau is California's largest farm organization, comprised of 54 county Farm Bureaus currently representing approximately 26,000 members in 56 counties. The Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources, and of utmost importance is the balanced availability of water resources.

SUMMARY OF ARGUMENT

"Water, of course, is a scarce resource in the western United States." *California v. United States*, 438 U.S. 645, 650 (1978). Any precedential decision impacting water use in the West touches on an issue of exceptional importance with widespread implications. As recognized by Executive Order No. 14181, 90 Fed. Reg. 8747 (Jan. 31, 2025), Emergency Measures to Provide Water Resources in California and Improve Disaster Response in Certain Areas, and Presidential Memorandum, 90 Fed. Reg 8479 (Jan. 20, 2025), "*Putting People Over Fish: Stopping Radical Environmentalism to Provide Water to Southern California,*" the impact of government interference with the availability of water is of profound national concern. *United Water Conservation District v. United States*, 133 F.4th 1050, 1053-1054 (Fed. Cir. 2025) (hereafter *United*), involves a situation the Executive Order aimed to correct. By virtue of the National Marine Fisheries Service's ("Service") 2016 letter from the Office of Enforcement, the government took 49,850 acre-feet from United Water Conservation District ("United")—enough water to supply tens of thousands of families for a year—for flow through a fish ladder to benefit endangered steelhead trout. Unless corrected, the opinion from the Federal Circuit will enable regulatory entities to commandeer water for environmental purposes in utter disregard for the state property rights systems that govern the apportionment of water.

Under common law and statutory schemes, priority is the central principle for allocating water

among competing uses. *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1243 (2000). Priority is expressed as a usufructuary property right, which "consists not so much of the fluid itself as the advantage of its use." *National Audubon Soc'y v. Superior Court,* 33 Cal.3d 419, 441 (1983).

The Federal Circuit opinion categorically misstates California water law by finding that despite possessing a previously vested appropriative water right, sanctioned by the State under its administrative licensing process, United "needed to have physically diverted water for its property right to vest" at the time it was appropriated by the government. *See United*, 133 F.4th at 1057-1058. Under this reasoning, it is impossible to state a physical takings case for any bypass flow requirement despite the Service denying United the advantage of its vested right in the priority of use.

The opinion confuses the requirement to divert water as prerequisite to establishing an appropriative right with an imaginary requirement to divert water before asserting harm due to the government's taking of a vested usufructuary priority. While water must be diverted and put to beneficial use to vest an appropriative right in the first instance, there is no requirement under California law to "re-vest" the right. Once vested through initial diversion and beneficial use, as United has indisputably already done, the right to use the water exists regardless of whether that water remains in-river or has been diverted.

Under a corrected understanding of California law, a previously vested appropriative water right need not be actually diverted and recalled by the government for a specified use to establish a physical taking claim under the Fifth Amendment. A government requirement to leave water in-river effectively deprives an appropriative-rights holder of the advantage of their priority and the associated water that could be lawfully diverted, constituting a physical taking. The Federal Circuit's failure to recognize this misstates California law, conflicts with Supreme Court precedent, and has broad implications for agricultural interests and water users nationwide. Correction by this Court is warranted, and we urge the Court to accept the petition for certiorari.

ARGUMENT

I. AGRICULTURAL ENTERPRISES HAVE A SPECIAL INTEREST IN WATER RIGHTS.

"Water is the true wealth in a dry land; without it, land is worthless or nearly so. And if you control the water, you control the land that depends on it." Wallace Stegner, *Beyond the Hundredth Meridian: John Wesley Powell and the Second Opening of the West* 230 (1992). California is a special place, often referred to as the nation's breadbasket, growing over 400 different crops in one of the only mediterranean growing climates in the western hemisphere. Apportionment of water rights in the arid west has crucial impacts on agricultural interests. Water is essential for all commerce, but none more so than agriculture. "Man must eat to live, and the problem of food will always be inextricably associated with

water." Thompson King, *Water: Miracle of Nature* 167 (1953).

As agricultural-based organizations that rely on the availability of water, amici have special interest, experience, and expertise in water law. Amici and their member organizations rely on water rights to provide them with a reliable water supply critical to the successful operation of their farming enterprises. That security in water availability underlies crop planning and financial considerations that impact the long-term stability of agricultural enterprises.

Concern with undue burden on water deliveries has received national recognition. In Executive Order No. 14181, 90 Fed. Reg. 8747 (Jan. 31, 2025), Emergency Measures to Provide Water Resources in California and Improve Disaster Response in Certain Areas, President Trump ordered the Secretary of Interior to "take all available measures" to maximize water deliveries and to remove procedures that are "unduly burden" water delivery projects. Similarly, in the companion Presidential Memorandum, 90 Fed. Reg 8479 (Jan. 20, 2025), "*Putting People Over Fish: Stopping Radical Environmentalism to Provide Water to Southern California,*" the President noted the need for "reliable water supply" and directs the agencies to focus on prioritizing human needs.

Water availability for critical needs such as farming, and the vested property interest in water rights that support that availability, must be protected from overreach by the government. The

ability of an entity to bring a physical takings claim challenging that overreach is a critical avenue to redress such actions. The Court should grant this petition to ensure those who wish to challenge government actions preventing use of those water rights are not blocked from pursuing in court their rights under the Fifth Amendment.

II. THE COURT SHOULD ACCEPT THE PETITION TO CORRECT THE FEDERAL CIRCUIT'S MISSTATEMENT OF CALIFORNIA WATER LAW.

As recognized by the Federal Circuit, "California property rights are governed by state law." *United*, 133 F.4th at 1056 (citing *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 155 (2021)). "Appropriative water rights (such as those at issue here) have long been recognized by California courts as private property subject to ownership and disposition." *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1354 (Fed. Cir. 2013) ("*Casitas II*") (citing *Thayer v. Cal. Dev. Co.*, 164 Cal.117, 125 (1912)); *see also* Cal. Water Code § 102 ("[T]he right to the use of water may be acquired by appropriation in the manner provided by law.").

Under California water law, "once rights to use water are acquired, they become vested property rights" that "cannot be ... taken by governmental action without due process and just compensation." *United States v. State Water Res. Control Bd.*, 182 Cal.App.3d 82, 101 (1986). Specifically, "senior appropriators," like United, "… are entitled to satisfy their reasonable needs, up to the full appropriation,

before more junior appropriators are entitled to any water." *California Water Curtailment Cases,* 83 Cal.App.5th 164, 180 (2022) (noting junior users may be prevented from diverting to satisfy senior rights in times of shortage of supply).

The Federal Circuit mistakenly ruled that United—despite already holding an undisputed vested right as evidenced by a water rights license–still "needed to have physically diverted water for its property right to vest" during the period of the claimed taking. *United*, 133 F.4th at 1058. This is wrong. Water rights licenses are issued by the California State Water Board only after a water user has *already met* state law requirements to appropriate and apply water to a beneficial use, and thus a license serves as confirmation of the vested right. *See* Cal. Water Code § 1610 (a license "confirms the right" to appropriate the water in the amount that has been applied to beneficial use). Issuance of a license is the final step in California's post-1914 statutory scheme regulating new water rights. *State Water Res. Control Bd.*, 182 Cal.App.3d at 102 (noting appropriative rights are confirmed upon issuance of a water rights license); *Eaton v. State Water Rights Bd.*, 171 Cal.App.2d 409, 415 (1959) ("The final procedural step in perfecting a water right is the issuance of a license").

Once vested, California law does not distinguish the scope of the right based on the water's location—in-river versus within a diversion structure—as the Federal Circuit did. Instead, the holder of an appropriative water right license has a vested property right whether the water has been

diverted at a given point in time or not. Cal. Water Code § 1627 (once issued, a license continues in perpetuity as long as the holder puts the water to beneficial use); Cal. Water Code § 1241 (requiring at least five years of nonuse and a finding by the state water board prior to reversion of a water right to unappropriated public water); *see also Arizona v. California*, 283 U.S. 423, 459 (1931) (noting diversion and use of water results in "a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever ….").[2]

Furthermore, the reach of the Federal Circuit's misunderstanding of California water law is not limited to that state because these foundational water law principles regarding vesting of water rights apply across the western states. *See, e.g.*, *County of Boulder v. Boulder & Weld Cty. Ditch Co.*, 367 P.3d 1179, 1186 (Colo. 2016) ("The doctrine of prior appropriation is embedded in the Colorado Constitution and forms the foundation of Colorado water law."); *Hage v. United States*, 51 Fed. Cl. 570, 577 (2002) (noting under Nevada law, "[a] vested water right becomes 'fixed and established ... either by actual diversion and application to beneficial use or by appropriation ... and is a right which is regarded and protected as property.'"); *see also United States v. Alpine Land &*

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[2] This licensing process mirrors that which applied to the perfection of appropriative rights acquired prior to the existence of the current statutory scheme. *Millview Co. Water Dist. v. State Water Res. Control Bd.*, 229 Cal.App.4th 879, 890 (2014) (noting under pre-1914 water rights, so long as an appropriator "did in fact divert within a reasonable time, and used the diverted water for a beneficial purpose, the claim was perfected.").

Reservoir Co., 510 F.3d 1035, 1040 (9th Cir. 2007) (explaining that nonuse alone does not establish abandonment).[3]

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[3] In fact, nationwide there are 19 states that use appropriative statutory schemes, underscoring the wide-reaching impacts of the Federal Circuit opinion. *See, e.g.*, Ariz. Rev. Stat. § 45-152 (right to apply for a permit to appropriate water for beneficial use); N.M. Const. art. XVI, § 2 (all unappropriated water belongs to the public and available for appropriation for beneficial use); Alaska Stat. §§ 46.15.030-.185 (water occurring in its natural state is "reserved to the people for common use and is subject to appropriation and beneficial use"); Colo. Const. art. XVI, §§ 5-6 (unappropriated water is public property and guaranteeing the right to divert such water subject to priority); Idaho Const. art. XV, § 3 (establishing right to divert and appropriate unappropriated waters to beneficial uses); Miss. Code § 51-3-1 (requiring the state's waters be placed to beneficial use under a regulatory system that prohibits waste and subjects all water to state management); Mont. Const. art. IX, § 3(1) (declaring all surface, underground, flood, and atmospheric waters in the state are property of the state "for the use of its people and are subject to appropriation for beneficial uses"); Nev. Rev. Stat. § 533.030 (stating that all water may be appropriated for beneficial use as provided by law); Okla. Stat. tit. 82, § 105.1A (stating legislative intent to provide unified appropriation system requiring beneficial use and recognizing priority in time as the better right); Utah Code §§ 73-3-1 (providing that an appropriation may be made only for a useful and beneficial purpose); Wash. Rev. Code § 90.03.010 (declaring that, subject to existing rights, all waters within the state belong to the public and may be acquired only by appropriation for beneficial use); Wyo. Const. art. VIII, §§ 1-3 (all natural waters within the state are property of the state with priority of appropriation for beneficial use and appropriation supervised by Board of Control); Kan. Stat. Ann. § 82a-703 (providing that all waters may be appropriated for beneficial use subject to vested rights); Neb. Rev. Stat. § 46-202 (providing that unappropriated waters of every natural stream are the property of the public and dedicated to use of the people,

Springing from its mistaken understanding of the law of prior appropriation prevalent in the western states, and consistently applied by California courts, the opinion from the Federal Circuit insists that for there to be a physical taking of the water right, an appropriator must either be deprived of 100% of the water it can physically appropriate, or be required to give back water already diverted under the theory that prior to the diversion, they had yet to qualify as a vested right. *United*, 133 F.4th at 1057-58.

Even ignoring the inconsistency with 175 years of California water law precedent, *see e.g.*, *Eddy v. Simpson,* 3 Cal. 249 (1853); *Crandal v. Woods*, 8 Cal. 136 (1857), the internal inconsistency of the opinion is hard to overlook. After recognizing that it was "undisputed that United acquired a valid, appropriative property right" to the water at issue (*United*, 133 F.4th at 1056)—specifically noting United held both a water license and permit from the State Water Board (*id.* at 1053)—the Federal Circuit perplexingly finds that the right had not vested because United had not "physically diverted water" at the time of the taking (*id.* at 1058). That contradictory

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subject to appropriation); N.D. Cent. Code § 61-01-01(specifies state waters belong to the public and are subject to appropriation for beneficial use); Or. Rev. Stat. §§ 537.110-130 (all waters within the state belong to the public and may be appropriated for beneficial use under permit system, subject to vested rights); S.D. Codified Laws §§ 46-1-3 (declaring that all water within the state is the property of the people, but the right to use water may be acquired by appropriation); Tex. Water Code §§ 11.001, 11.022 (providing that state water may be governed by appropriation, with pre-1895 riparian rights vested.)

statement fails to acknowledge that United had **already** physically diverted the water and applied it to a beneficial use prior to the government action, the only necessary prerequisites to gaining an appropriative water right in the first place. The government subsequently appropriated the water by ordering that it be sent to the fish ladder, thus depriving United of the usufructuary right to the priority of its vested right to divert the water for its own use. Although the Federal Circuit attempts to characterize the bypass flow requirement as "a nonpossessory government activity," that characterization ignores that requiring United to leave water in the river for the fish disturbs United's vested right to the water and functions in the same way as the government taking possession of the water for itself. *Id.* at 1058.

This Court must correct the Federal Circuit's mischaracterization of what is needed to vest an appropriative water right in the context of a physical taking under the Fifth Amendment. It cannot be that an order from the government is any less a physical taking because it commandeers the water before it gets to United's intake. Whether United diverted the water into its canals and returned it to the channel, or left it there in the first instance, the consequences are the same—49,850 acre-feet of water was permanently taken from United, and it should be allowed to pursue that physical takings claim in court.

III. THE COURT SHOULD ACCEPT THE PETITION TO CORRECT THE CONFLICT WITH EXISTING PRECEDENT DISCUSSING PHYSICAL TAKINGS OF APPROPRIATIVE WATER RIGHTS.

This corrected understanding of California law undercuts the Federal Circuit's conclusion that "Supreme Court precedent and related cases United cites are consistent with our decision here." *United,* 133 F.4th at 1058 (citing to *Int'l Paper Co. v. United States*, 282 U.S. 399 (1931), *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), *Dugan v. Rank* 372 U.S. 609 (1963), and *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008) ("*Casitas I*"). Neither this Court's precedent nor the Federal Circuit's precedent supports the opinion's novel requirement that the holder of a previously vested appropriative water right must have already physically diverted water away from its source for a physical taking claim to accrue. There is no material difference between the rights granted under an appropriative water right based on the water's location in-river or in a diversion structure.

Based on its read of *International Paper* and *Casitas I*, the Federal Circuit states that United must allege "the government completely cut off its access to the water or caused it to return [a] volume of water it had previously diverted" in order to state a valid physical taking claim. *United,* 133 F.4th at 1057. But that is inconsistent with the underlying principles articulated in those cases. In *International Paper*, this Court stated that "[t]he petitioner's right was to the use of the water" and noted that International

Paper was deprived of its property right by government action, which prevented any diversion of the water. *Int'l Paper*, 228 U.S. at 405, 407 (noting that the government intended to cut off the water being diverted); *see also Casitas I*, 543 F.3d at 1289 (noting the government prevented International Paper from diverting water for its intended use). International Paper's inability to divert and use water to which it held a property right was sufficient to support a physical taking claim.

In *Casitas I*, an appropriative-right holder was required to devote a portion of its water to the operation of a fish ladder. 543 F.3d at 1282. The Federal Circuit opinion emphasizes that Casitas had already diverted the water and was subsequently required to return it through the fish ladder. *See United*, 133 F.4th at 1057. This ignores, however, *Casitas I*'s focus on the permanent deprivation of the water right that was caused by the government's actions. "[T]he water that is diverted away from the [canal] is permanently gone. Casitas will never, at the end of any period of time, be able to get that water back." *Casitas I*, 543 F.3d at 1296. The water is similarly "permanently gone" when an entity is prevented from diverting it in the first place.

The Federal Circuit incorrectly dismisses two cases from this Court—*United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) and *Dugan v. Rank*, 372 U.S. 609 (1963)—by stating they are inapplicable as they address riparian rights. This distinction appears founded in the erroneous conclusion that United's water right had not yet vested as an appropriative right and, therefore, somehow had

different status than a riparian rightsholder would. *United*, 133 F.4th at 1058 ("the appropriative-rights holder here needed to have physically diverted water for its property right to vest and thus become subject to a physical taking, as in *Casitas*."). The Federal Circuit opinion also suggests that had the downstream users in *Dugan* and *Gerlach* been holders of appropriative rights rather than riparian rights, the outcomes would have been different. This is wrong. The right is a usufruct and an appropriative-rights holder with a diversion point downstream from a dam is prevented from diverting and using the water under its vested right in the same way a riparian right is prevented from using its water right.[4] The fact that an appropriator vests its right upon initial application to beneficial use and a riparian vests by the acquisition of land, is irrelevant once the usufructuary right has vested.

The Federal Circuit suggests United can simply apply to the Service for the necessary permit, be denied, and then proceed to court with a regulatory takings claim. *United*, 133 F.4th at 1058–59. In addition to the long, arduous, and costly effort to apply for the required permit under the Endangered Species Act, the government's actions here do not fit within the confines of a regulatory taking as defined by relevant cases. The government's decision to prohibit United from diverting a portion of its water is more than a burden, restriction in use, or temporary impairment of United's water right—the

[4] Additionally, as noted by the court in *Casitas I*, the water rights at issue in *Dugan* were not just riparian, but included "other water rights in the river." *Casitas I*, 543 F.3d at 1290.

typical hallmarks of a regulatory taking. To the extent the Federal Circuit cites to *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004) and *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002) to support its holding that this case presents a temporary restriction on natural resources, *see United*, 133 F.4th at 1058, it ignores that *Casitas I* expressly distinguished temporary use restriction from permanent deprivations. *Casitas I*, 543 F.3d at 1296 (finding the regulatory taking analysis for temporary restrictions inapplicable given Casitas "will never … get that water back."). Even partial impairment of a water right is sufficient to find a physical taking. *See id.* at 1292 ("[I]n the physical taking jurisprudence any impairment is sufficient."); *see also Washoe Co., Nev. v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003) (noting a physical taking can occur where the government "decreased the amount of water accessible" by the owner of the water right). Government action preventing diversion and use of water under a vested appropriative water right is a permanent deprivation properly analyzed as a physical taking. United should not be forced into the regulatory takings pathway, with its associated costs in terms of time and finances, when the government's actions now already qualify as a physical taking.

Under the Federal Circuit opinion, government action decreasing the amount of water available for diversion would never qualify as a physical taking unless the government took 100% of the water right, or the water right holder first removed the water from the river, and then was forced to return it. Decreasing the amount of water available for diversion,

however—in any amount—is a permanent deprivation of the water right. There is no meaningful difference in the impact to United's vested appropriative right from a requirement to leave water in-river versus allowing United to first divert to its canal but then requiring the return of the water to the river prior to use.

California water law makes no distinction in the vested right based on whether the water is in-river or diverted to another structure. In either scenario, once vested by having completed its appropriation, an appropriative-rights holder is permanently deprived of a portion of their right because "[t]he water, and [the] right to use that water, is forever gone." *Casitas I*, 543 F.3d at 1294 n.15 (noting that the water used for a fish ladder was "gone forever, as the license does not allow Casitas to make up this amount in subsequent years."); *see also Casitas Mun. Water Dist. v. United States*, 556 F.3d 1329, 1332 (Fed. Cir. 2009) (memorandum disposition) (Moore, J. concurring in the denial of rehearing en banc) ("Nor is there a distinction between some water that must remain in the Ventura River and the water needed for the fish ladder."). Whether required to divert and return water, run it through a fish ladder, or leave it in-river as the Service required, United has been permanently deprived of its vested right to use the water guaranteed under its licenses. That deprivation is a physical taking and United should be allowed to pursue its claim in court.

CONCLUSION

Meting out water among competing claimants under the water rights hierarchy is no simple exercise in California, a state intermittently besieged by drought, floods, and fires, and further impacted by zealous regulations. The Federal Circuit opinion, if left unrectified, will cause harm by enabling the government to appropriate vested water rights under the pretext that denial of access to water is not a taking. This contradicts the Takings Clause, this Court's precedent, and California water law, and has the potential to significantly impact water rights reliability for critical needs such as agriculture. The petition for a writ of certiorari should be granted.

Respectfully submitted

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Ryan R. Waterman
Counsel of Record
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
225 Broadway, Suite 1670
San Diego, CA 92101
Telephone: 619.702.7569
Email:
rwaterman@bhfs.com

Mary C. Loum
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
1415 L Street, Suite 800
Sacramento, CA 95814
Telephone: 916.594.9700
Email: mloum@bhfs.com

Scott S. Slater
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
1020 State Street
Santa Barbara, CA
93101
Telephone:
805.963.7000
Email:
sslater@bhfs.com

Counsel for Amici