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 WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONER

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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.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. WLF advances that mission, in part, by advocating for clarity and precision in this Court's Takings Clause jurisprudence. *Horne v. U.S. Dep't of Agric.*, 576 U.S. 350 (2015); *Phillips v. WLF*, 524 U.S. 156 (1998).

INTRODUCTION AND SUMMARY OF ARGUMENT

When Darius of Persia "sent heralds here and there throughout Greece, under instructions, and bade them ask for earth and water for the King," he wasn't drawing a material distinction between the two takings. Herodotus, *The History* 6.48 (David Grene trans., Univ. of Chi. Press 1988). He was simply announcing that the Persians had arrived to take the Greeks' stuff. *Id.* ("Would they fight him or surrender?").

When the federal government arrives to take your stuff—earth or water—the Constitution requires Washington to pay you for it. U.S. Const. amend. V. Yet the Federal Circuit has decreed that if the

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* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission. Every party's counsel received timely notice of WLF's intent to file this brief.

government collects water rather than occupies soil, it's a regulatory taking. That can't be right. This Court's Fifth Amendment jurisprudence has no shoreline or riverbank. *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Horne*, 576 U.S. at 362. "Physical appropriations constitute the 'clearest sort of taking,'" and this Court must "assess them"—land or water—"using a simple, per se rule: the government *must* pay for what it takes." *Cedar Point*, 594 U.S. at 148 (quoting *Palazzolo v. R.I.*, 533 U.S. 606, 617 (2001) (emphasis supplied, capitalization and italics altered)).

Here the federal government has "redirected the water" owned by another "to the public use of promoting the migration of steelhead trout." Pet. 19. It has threatened the United Water Conservation District with "significant civil and even criminal penalties" if it declines to "surrender[]" 49,800 acre-feet of Santa Clara River "water to flow downstream," *id.* at 10, rather than using that water for its own "numerous beneficial uses, including recharging groundwater aquifers, delivering surface water to groundwater users, and stabilizing the riverbed." *Id.* at 7–8. The Federal Circuit's decision, that this forced acquisition was merely a regulatory taking, killed the case—rendering it unripe for review. And even if United Water eventually gets its day in court, under this Court's lax regulatory takings jurisprudence, the federal government will likely get what it wants without paying for it.

Water has long been essential to the growth and development of the United States, and it will continue to be so in the low-carbon, nuclear-powered AI-dominated future. When governments wish to tap

or seize others' water rights to build up the future's energy grid, they must pay for doing so, "regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002).

In short, this Court's land-takings jurisprudence should seamlessly port over to water takings as well. The Federal Circuit's contrary rule is "not susceptible of principled application." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 515 (2005) (Thomas, J., dissenting). Water, like land, *Cedar Point*, 594 U.S. at 148, or air, *United States v. Causby*, 328 U.S. 256, 268 (1946), has a market value and so, when claimed by the United States for public use, just compensation must follow.

Even if that's not the Court's view, it should still take the case. If it's true that water is a second-class property right, more susceptible to encumbrance by regulation under this Court's regulatory takings caselaw, then the Court needs to revisit that doctrine and fix it. This Court should not ignore the dire need for clarity, certainty, predictability, and bright-line rules in its Takings Clause jurisprudence.

The Court's modern regulatory takings caselaw has always been in tension with the Fifth Amendment. "Of all the terms in used in the Taking[s] Clause, 'just compensation' has the strictest meaning." *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 150 (1978) (Rehnquist, J., dissenting). "The Fifth Amendment 'prevents the public from loading upon one individual more than his just share of the burdens of government,'" and "'when he surrenders to

the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.'" *Id.* at 147–48 (Rehnquist, J., dissenting) (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893)).

"[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis omitted). Perhaps it's time for another pellucid rule: a government can always make "public use" of earth and water, so long as it "provide[s] the owner with just compensation." *Cedar Point*, 594 U.S. at 147. And so, where a "contested regulation directly compels the transfer of a specifically identified property interest by operation of law," the government should always have to pay for its share of that taking. Luke A. Wake, *Check Your Rights at the Door: Rethinking Confiscatory Regulation*, 68 Drake L. Rev. 123, 183 (2020).

ARGUMENT

I. THERE'S NO CONSTITUTIONAL DIFFERENCE BETWEEN TAKING LAND AND TAKING WATER.

The oil strikes in California around the turn of the Twentieth Century brought not just people and profits to that State, but "frantic political battles . . . over water-rights and irrigation schemes," themselves just "a prolegomenon to the giant schemes revolving the Colorado and Hoover dams," as "harnessing rivers and delivering water were linked directly to power supply and electrification." Paul

Johnson, *A History of the American People* 688 (HarperCollins 1999).

We can expect more of the same in the coming decades. If the United States wishes to embark on a less carbon-intensive energy portfolio and handle the rapidly scaling demands for electricity brought about by AI innovation, it seems inevitable that the country's energy grid will become increasingly reliant on nuclear power. Tim De Chant, *Trump DOE gives Microsoft partner $1B loan to restart Three Mile Island reactor*, TechCrunch, Nov. 18, 2025, https://perma.cc/7EG3-VPRB. And access to water, in turn, is essential for modern nuclear power. Int'l Atomic Energy Agency, *Efficient Water Management in Water Cooled Reactors* 20 (2012), https://perma.cc/SB5N-RNN3.

Even if the so-called energy transition doesn't force the U.S. into converting its baseload to nuclear power, projected demands likely mean that we will need more nuclear power than the current carbon-heavy mix. So the federal government is necessarily going to need to tap or seize water owned by others—governmental entities like the Petitioner and private owners—to do so. When it does, it should have to pay for it. *Tahoe-Sierra Pres. Council*, 535 U.S. at 322.

But unless this Court grants review, that might not be so. This case involves a property right in water that was "acquired and maintained by actual use," *Colo. v. N. Mexico*, 459 U.S. 176, 179 n.4 (1982), and which has been taken by the United States without compensation. The federal government wants access to 49,800 acre-feet of that water, having threatened "significant civil and even criminal

penalties," against the Petitioner if it fails to "surrender[] more of its water to flow downstream" for federal purposes, Pet. 10, rather than using it for United Water's own "numerous beneficial uses." *Id.* at 7.

The Federal Circuit treated this flow of physical property from United Water to the United States as if it were "a regulatory limit with the same economic impact" as an appropriation, not an actual taking. *Cedar Point*, 594 U.S. at 152. That holding not only made this case unripe for review on the merits—it ensured that United Water will almost certainly never be compensated for the federal government's grab. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522–23 (1992).

The federal government's demand has all the hallmarks of a physical taking. The United States has reached in and "'physically take[n] possession of an interest'"—49,800 acre-feet-worth—"'in property for some public purpose.'" *Ark. Fish & Game Comm'n v. United States*, 568 U.S. 23, 31 (2012) (quoting *Tahoe-Sierra Pres. Council*, 535 U.S. at 322). It also "required acquiescence" of the transfer of the water itself for federal purposes, and "required acquiescence is at the heart of the concept" of a physical taking. *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987).

Had the United States asked for the regular surrender of molecules aggregating into swathes of land, or forming into produce, the Federal Circuit would have been bound by precedent to deem this a physical taking. No one "expect[s] their property . . . to be actually occupied or taken away." *Horne*, 576 U.S. at 361. The same goes for the sky. The Fifth

Amendment requires just compensation when the government frustrates the use of a property owner's "immediate reaches of the enveloping atmosphere." *Causby*, 328 U.S. at 264.

But if those H_2O molecules are *water* instead of *clouds*, the Federal Circuit says the outcome is different. Such a water/non-water rule is just "not susceptible of principled application." *Kelo*, 545 U.S. at 515 (Thomas, J., dissenting). Water use, just as much as land or air, has a market value—as this Court has repeatedly acknowledged. *Int'l Paper Co. v. United States*, 282 U.S. 399, 407–08 (1931); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 754–55 (1950); *Dugan v. Rank*, 372 U.S. 609, 625–26 (1963). Since the "Constitution protects rather than creates property interests," *WLF*, 524 U.S. at 164, deprivations of water shouldn't be treated any differently than deprivations of land. The direct seizure of space-and-time can't be compared to the incidental effect of regulation, because "the deprivation" itself "constitutes the taking." *United States v. Gen'l Motors Corp.*, 323 U.S. 373, 378 (1945); *cf. Dugan*, 372 U.S. at 625 ("A seizure of water rights need not necessarily be a physical invasion of land").

And yet that's the rule below. The Federal Circuit has turned water into a second-class property right, which need be recompensed when the usage has been functionally destroyed. Pet. 21–22. This Court rejected that rule for takings of soil and foodstuffs in *Cedar Point* and *Horne*, and it should grant the writ to once again reject a "permissive approach to property rights" that "hearkens back to views expressed (in dissent) for decades." *Cedar Point*, 594 U.S. at 159.

II. IF THIS TRULY IS A REGULATORY TAKING, IT'S TIME TO RECONSIDER HOW REGULATORY TAKINGS WORK.

Governments, like water, will always try to find the path of least resistance. And so, they will always run to the defense of regulatory takings, where the government often gets what it wants for free. *Yee*, 503 U.S. at 522–23. Respondents did so in *Horne*, 576 U.S. at 356–57, in *Cedar Point*, 594 U.S. at 146, and here.

If the decision below is correct, it suggests that the Court needs to rethink how it has applied its regulatory-takings doctrine since 1978. In *Penn Central*, 438 U.S. at 123–28, the Court attempted to put some meat on the bones of its prior holdings that a regulation triggers the Fifth Amendment's Takings Clause when it "goes too far." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). But, in practice, both "courts and commentators have struggled, perhaps quixotically, to divine meaningful analytical rules from *Penn Central*." Wake, *Check Your Rights*, 68 Drake L. Rev. at 131–32. As best as can be distilled from the caselaw, the rule is that "regulatory restrictions limiting the permissible uses of private property are unlikely to amount to a taking." *Id*. at 147.

That's a gaping void in the security of a right whose importance is best reflected in John Adams's "tersely" worded aphorism that "'property must be secured, or liberty cannot exist.'" *Cedar Point*, 594 U.S. at 147 (quoting *Discourses on Davila*, in 6 Works of John Adams 280 (C. Adams ed. 1851)) (brackets omitted). At the time of the Founding, "it seems clear

that almost no one believed the federal government would have the power to regulate land use and thereby engage in any sort of regulatory taking." Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 Wm. & Mary L. Rev. 2053, 2081 (2004). And yet, as the asserted powers of the federal government have expanded, this Court's jurisprudence has line-edited Adams's slogan to read "property must be secured, or liberty cannot exist, unless the property right is deprecated by regulation, then it's probably fine." This "unprincipled line between occupation and regulation" has been "quickly manipulated to put rent control, mineral rights, and air rights in the wrong category, where the weak level of protection against regulatory takings encourages excessive government activity." Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 Stan. L. Rev. Online 99, 105 (2012).

In short, it's a specious principle that insists that regulatory-based deprivations of property may usually be had for free. "The Fifth Amendment prevents the public from loading upon one individual more than his just share of the burdens of government," and ensures "that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Penn Cent.*, 438 U.S. at 147–48 (Rehnquist, J, dissenting) (internal quotation marks and citation omitted). Rather than treat most regulatory takings as an acceptable dilution of a person's property right that must undergo a complicated and "vexing" balancing test, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538–39 (2005), courts should presume that

where a "regulation directly compels the transfer of a specifically identified property interest by operation of law," the government must cut the affected owner a check—full stop. Wake, *Check Your Rights*, 68 Drake L. Rev. at 183.

This would create a singular rule wall-to-wall: whether the government takes your stuff for "public use" through physical occupation or demands that you fork it over at the pointy end of a regulation, it owes you "just compensation." U.S. Const., amend. V.

CONCLUSION

If the government takes your earth or water for public use, it owes you money when it does so. The Court should grant the writ.

Respectfully submitted,

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