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

BRIEF OF ASSOCIATION OF CALIFORNIA WATER AGENCIES, ET AL., AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Association of California Water Agencies is the largest statewide coalition of public water agencies in the United States, whose 460+ members are collectively responsible for approximately ninety percent of the water delivered to agricultural, domestic, and industrial beneficial uses in California. Mission Springs Water District, Modesto Irrigation District, Rowland Water District, San Gorgonio Pass Water Agency, Santa Clarita Valley Water Agency, South San Joaquin Irrigation District, and Turlock Irrigation District are among the many ACWA members who depend on appropriative rights to supply their water users.

National Water Resources Association is a nonprofit federation of state water resources associations and special interest caucuses, whose members include irrigation districts, water conservation and conservancy districts, municipal water districts, farmers, ranchers, and others with an interest in water issues in the western United States. The NWRA has member entities in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Washington. With roots that date back to the 1890s, it is the oldest national association

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[1] Counsel for amici curiae state that no counsel for a party authored this brief and that no person other than amicus curiae or their counsel made a monetary contribution to the preparation or submission of this brief. Under USSC Rule 37.2, counsel for amici curiae gave notice to the parties' counsel of record more than 10 days prior to this filing.

concerned with water resources policy and development. NWRA members provide water and hydropower to approximately 50 million individuals, families, agricultural producers, and other industries that support our communities (large and small), economy, and environment. One of the primary objectives of the NWRA is to advocate on behalf of western water users for federal government compliance with all applicable state laws and regulations and interstate compacts governing the appropriation, distribution, control, or use of water.

The Public Water Agencies Group (the "Group") is a non-profit mutual benefit corporation comprised of 21 public water agencies and mutual water companies that provide retail, wholesale, replenishment, and watermaster services throughout Los Angeles County.[2]

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[2] The Group consists of Bellflower-Somerset Mutual Water Company, Crescenta Valley Water District, Kinneloa Irrigation District, La Cañada Irrigation District, La Habra Heights County Water District, La Puente Valley County Water District, Main San Gabriel Basin Watermaster, Montebello Land and Water Company, Palmdale Water District, Pico Water District, Quartz Hill Water District, Rowland Water District, Rubio Cañon Land and Water Association, San Gabriel County Water District, San Gabriel Valley Municipal Water District, South Montebello Irrigation District, Sunny Slope Water Company, Three Valleys Municipal Water District, Valencia Heights Water Company, Valley County Water District and Walnut Valley Water District.

The California Special Districts Association is a non-profit organization with membership consisting of over 1,000 special districts throughout California. It was formed to promote good governance and improve core local services through professional development, advocacy, and other services for all types of independent special districts. Independent special districts provide a wide variety of public services to urban, suburban, and rural communities throughout California, including providing water for all manner of beneficial uses.

The Family Farm Alliance is a grassroots, non-profit organization composed of family farmers, ranchers, irrigation districts, and allied industries in sixteen western states. The Alliance's mission is to ensure the availability of reliable and affordable irrigation water supplies to western farmers and ranchers, including supplies from federal water projects. The Alliance has a long history of collaboration with constructive partners in all levels of government, with conservation and energy organizations, and with Native American tribal interests who seek real solutions to water resources challenges in the West.

Ventura County Coalition of Labor, Agriculture, and Business ("VC CoLAB") is a non-profit advocacy organization representing over 700 members throughout Ventura County and Southern California. Our diverse membership includes agriculture, commercial business, manufacturing, construction, real estate, finance, transportation, energy, and property owners who support our efforts

to advocate for reasonable regulatory processes and a robust local economy.

Appropriative water rights are essential to the water rights framework of the western states. Amici and their members rely on appropriative rights to supply water to residents, industries, and agriculture. The decision below denies Fifth Amendment protection to appropriative rights based on misstatements of Takings Clause jurisprudence and of California law, which would undermine the security of investments in water appropriations that are critical to solving California's water supply problems.

SUMMARY OF ARGUMENT

The Court should grant certiorari, because the Federal Circuit "has decided an important question of federal law … in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

The issue presented is of paramount importance. In the arid western states, including California, the law of appropriative water rights developed in response to the fundamental condition of water shortage that is endemic to the west. Without secure property rights protections, appropriators will not be incentivized to make the substantial investments required to develop and conserve this scarce and critical resource. Through such development, California has created a thriving economy in major urban centers that are dependent on appropriations. California also leads the nation in agricultural output. Therefore, destabilizing the

protection of appropriative rights, as the decision below does, negatively impacts the economy of one of the nation's largest states as well as the nation's food security. *Infra*, Part I.

There are several ways in which the decision below conflicts with precedent. First, it mischaracterizes the nature of appropriative rights in California law, in direct contradiction to decisions of this Court that correctly apply the law of appropriative rights. *Infra*, Part II. Second, it contradicts this Court's broader jurisprudence regarding "partial takings," including cases concerning water rights. *Infra*, Part III.

ARGUMENT

I. Appropriative Water Rights Are of Fundamental Importance to California and the Other Western States

A. Appropriative Rights Are Crucial to California and the West

The common law of water rights "developed where lands were amply watered by rainfall." *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 745 (1950). During the nation's westward expansion, experience demonstrated that this doctrine, which "had served well in the humid regions of the East … would not work in the arid lands of the West." *California v. United States*, 438 U.S. 645, 655 (1978). In the arid West—the seventeen states west of the 100th meridian—"water means the difference between farm and desert, ranch and wilderness, and even life

and death." *Hage v. United States*, 35 Fed.Cl. 147, 172 (1996).

The western states developed water rights laws and customs adapted to the "peculiar necessities of their condition." *California*, 438 U.S. at 656. Their "most fundamental water problem" is "maldistribution of moisture in relation to human needs." *El Dorado Irrigation Dist. v. State Water Res. Control Bd.*, 142 Cal.App.4th 937, 945 (2006). Settlement of the West thus required diversion of water from streams for use elsewhere, often over great distances. This "fundamental need to invest in long-term improvements in the form of ditches and other equipment" necessitated the development of the doctrine of appropriative rights. Richard Epstein, *Property Rights in Water, Spectrum, and Minerals*, 86 U. COLO. L. REV. 389, 402 (2015).

The ever-present need to make such investments and to conserve and steward a scarce and vital resource has given rise to a constitutional framework for water law in California. In 1928, the People of California amended their constitution to declare California's fundamental water policy:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, … in the interest of the people and for the public welfare."

Cal. Const. art. X, § 2. The purpose of the amendment was "to make it possible to marshal the water resources of the state and make them available for the constantly increasing needs of all of its people." *Meridian, Ltd., v. City and County of San Francisco*, 13 Cal.2d 424, 451 (1939). Those needs continue to increase. In 1930, immediately following the amendment, the population of California was 5,677,251. Statistical Abstract of the United States 9 (1931), https://www2.census.gov/prod2/statcomp/documents/1931-02.pdf. By 2020, it was 39,538,223—an almost seven-fold increase. U.S. Census Bureau, 2020 Census: Table 2, https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-table02.pdf.

That growth was made possible by large appropriations of water, including numerous state, federal, and local projects, all requiring massive investments of capital. Californians have invested tens of billions of dollars to develop infrastructure that conveys appropriated water—sometimes hundreds of miles—to large urban centers and productive agricultural regions. The state's largest urban centers rely on their investment-backed expectations in these water supplies to grow and remain socially and economically vibrant, and its farmers rely on their appropriated water supplies to produce food and fiber for California and for the nation. Through these investments, California has become the fourth-largest economy in the world. Press Release, Office of the California Governor, California is now the 4th largest economy in the world, https://www.gov.ca.gov/2025/04/23/california-

is-now-the-4th-largest-economy-in-the-world/ (last visited July 2, 2025).

Those investments, funded through taxes, assessments, and water charges, are secured by California law's protection of an appropriator's **vested property right** in the continued appropriation and use of water. See *infra*, II.A. Reductions in supply impose serious burdens on water suppliers, who often must incur large costs to develop substitute supplies and thus increase charges to their ratepayers. The decision below permits federal agencies to redirect water from those projects to uses favored by the agencies with no compensation, upsetting existing investment-backed expectations and disincentivizing further investment. California's current water supply challenges require additional investments in new projects and improvements. California's Water Supply Strategy (2022), https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/CA-Water-Supply-Strategy.pdf; Water Blueprint for the San Joaquin Valley, *California is facing a water scarcity that we can't ignore*, https://waterblueprintca.com/information/the-need/ (last visited July 2, 2025). Public water agencies need to invest billions of dollars in projects like the Delta Conveyance Project, the Sites Reservoir, the Shasta Dam Enlargement, groundwater recharge, desalination, water recycling, and more. The public and private sectors need assurance that if the water they invest in capturing is repurposed by federal

agencies, the agencies will adequately compensate affected water-right holders for their property losses.

B. Appropriative Rights Are Essential to California Agriculture and to the Nation's Food Supply

The agricultural potential of the western states was recognized from an early date. In his magisterial report on the conditions of the arid West, Major John Wesley Powell identified the problems and the promise of western agriculture:

> "All of these lands require either … to be redeemed from excessive humidity [or] to be redeemed from excessive aridity. When the excessively humid lands are redeemed, their fertility is almost inexhaustible, and the agricultural capacity of the United States will eventually be largely increased…. In like manner, … the arid lands, so far as they can be redeemed by irrigation, will perennially yield bountiful crops…."

J.W. Powell, Report on the Lands of the Arid Region of the United States at viii (2d. Ed., 1878), https://pubs.usgs.gov/unnumbered/70039240/report.pdf. Powell's predictions have particularly proven true in California, which leads the nation in agriculture. In 2022-23, California farmers produced 18.2% of the nation's dairy and 10.4% of the nation's entire agricultural output (by cash farm receipts). California Department of Food and Agriculture,

California Agricultural Statistics Review 2022-2023 at 3 https://www.cdfa.ca.gov/Statistics/PDFs/2022-2023_california_agricultural_statistics_review.pdf. California leads the nation in dozens of crops and is the sole (99%+) producer of many—including garlic, grapes, olives, certain tree nuts (almonds, pistachios, walnuts), and certain stone fruits (cling peaches, plums). *Id*. at 9. California farmers achieve this prodigious output, essential to the nation's food-security, largely using appropriated water. This vital role of appropriated water in the nation's agriculture is another reason to grant certiorari, because the decision below jeopardizes the security of those appropriations.

II. The Decision Below Does Not Apply the Law of Appropriative Water Rights that This Court Has Recognized

A. State law concerning appropriative rights must be allowed to define the property rights at issue, as this Court affirmed in *Cedar Point Nursery*.

It is state law that defines the property interest at issue in a takings case. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 155 (2021) ("[T]he property rights protected by the Takings Clause are creatures of state law."). California law is clear: it is "axiomatic that once rights to use water are acquired, they become vested property rights" and "cannot be infringed by others or taken by governmental action without due process and just compensation." *United States v. State Water Resources Control Bd.*, 182

Cal.App.3d 82, 101 (1986). This Court has expressly acknowledged that water rights under California law are protected by the Takings Clause and that, if the federal government interferes with such rights, it must compensate the right-holder. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 754–55 (1950); *Dugan v. Rank*, 372 U.S. 609, 625–26 (1963). The decision below attempts to distinguish those cases because they "involve[d] riparian rights, not appropriative rights."[3] *United Water Conservation Dist. v. United States*, 133 F.4th 1050, 1058 (Fed. Cir. 2025). The distinction is irrelevant, as California law is clear that appropriative rights are also "vested rights" that are compensable if taken. See, e.g., *United States*, *supra*, 182 Cal.App.3d at 139. Indeed, the California Constitution, which "dictates the basic principles defining water rights" in California, explicitly protects **both** riparian and appropriative rights. *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1242 (2000), citing Cal. Const. art. X, § 2.

The decision below also argues that an appropriator "need[s] to have physically diverted water for its property right to vest and thus become subject to a physical taking." *United Water Conservation Dist.*, *supra*, 133 F.4th at 1058. That is also contrary to California law, which has always acknowledged the appropriative right as itself a

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[3] As shown in this brief, the distinction is irrelevant. But to be clear, *Dugan* involved appropriative rights as well as riparian rights. See *Rank v. Krug*, 142 F. Supp. 1, 115 (S.D. Cal. 1956).

private property right. *Thayer v. California Dev. Co.*, 164 Cal. 117, 129 (1912); see generally Wells A. Hutchins, The California Law of Water Rights 120–22 (1956) [describing earliest cases]. That usufructuary right is a "vested" real property right. *Pleasant Valley Canal Co. v. Borror*, 61 Cal.App.4th 742, 752 (1998).

B. The decision below contradicts this Court's prior decisions regarding appropriative water rights, including *Dugan* and *International Paper*.

These errors concerning the law of appropriative rights are not simply misconstructions of one state's law. The doctrine of prior appropriation is relatively consistent across the western states. See generally, 1 Wells A. Hutchins, Water Rights Law in the Nineteen Western States (1971), 14 (law of appropriation "prevails throughout the statutory and case law of the West"). This Court has long recognized that appropriative rights are compensable property interests, and *Dugan* is a seminal example. The Court there held that "[i]nterference with or partial taking of water rights" by the government, even through actions upstream that "subordinate [the claimants] water rights to the [government's] uses … constitute an appropriation of property for which compensation should be made." *Dugan*, *supra*, 372 U.S. at 625, citing 1 Wiel, Water Rights in the Western States (3d ed. 1911), § 15. Note that the protection of the Takings Clause applied in *Dugan* even where

upstream activity prevented the right-holder from diverting its water in the first place. The decision below instead argued that compensation is only required where "after the water had been diverted … the government subsequently mandated a return of that water for a public purpose—fish preservation." *United Water Conservation Dist.,* 133 F.4th at 1057, distinguishing *Casitas Municipal Water District v. United States*, 543 F.3d 1276, 1291–92 (Fed. Cir. 2008) ("*Casitas I*"). That cannot be reconciled with *Dugan*.

Nor can it be reconciled with another precedent of this Court, *International Paper Company v. United States*, 282 U.S. 399, 405–06 (1931), in which the government "cut off the water being taken" **before** it was diverted, which the Court found to be a taking. See also *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**.") (emphasis added). The government action in *International Paper Company* was the same as NMFS's action in this case: it "cut off the water being taken by [the right holder] and thereby increase[d] [another use of the water]." *Int'l Paper Co.*, 282 U.S. at 405–06. Redirecting a resource from the owner's use to one "deemed more useful" by the government is "not … any less a taking" than directly expropriating it. *Id.* at 408. In this case, the use "deemed more useful" by the government was "the preservation of the habitat of an endangered

species," which *Casitas I* held amounted to a public use of the water. 543 F.3d at 1292.

NMFS exercised federal power to redirect water from United's uses to NMFS's preferred uses, permanently usurping United's vested rights. Compensation for that redeployment of United's water is required by the core purpose of the Takings Clause: "to prevent the 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." *Murr v. Wisconsin*, 582 U.S. 383, 393 (2017) (internal quotation marks omitted).

III. The Decision Below Contradicts This Court's Jurisprudence Regarding Partial Takings, Including *Dugan* and *Loretto*

The decision below also distinguished *International Paper Company* because in that case "the government completely cut off [the claimant's] access to the water." *United Water Conservation Dist.,* 133 F.4th at 1057. This distinction is "insupportable as a matter of precedent and common sense." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 153 (2021). There is "no reason the law should analyze an abrogation of the right to [divert water for use] in one manner if it extends [to 100% of that water supply], but in an entirely different manner if it [extends to 99% of that water supply]." *Ibid.* Just as in *Casitas I*, it is immaterial that United was allowed to divert **some** of its water, because the specific water that United was required to bypass is now "gone forever." 543 F.3d at 1294 n.15.

Likewise, in *Dugan*, this Court held that a taking of water rights occurs "if **any part** of respondents' claimed water rights were invaded." 372 U.S. at 623 (emphasis added). "Interference with or partial taking of water rights … might be analogized to interference or partial taking of air space over land." *Id*. at 625. Such partial takings are also analogous to the seminal case of *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982). The *Loretto* Court held "a permanent physical occupation" of property, even as small as a cable box, constituted a per se taking because it "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."[4] 458 U.S. at 435. Likewise, if an appropriator is entitled to, for example, 1,000 acre-feet and the government takes 100 acre-feet for its own use, the government has not impaired his right to the 1,000 acre-feet by 10%. It has taken 100% of his right to **that** 100 acre-feet of water. For purposes of the critical interests of California appropriators described *supra*, Part I, any reduction in water supply takes away a valuable property right, and individual appropriators and their rate-payers should not bear the cost of that reduction.

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[4] An analogous rule applies to temporary physical takings, which are not simply impairments of a fee interest but can be conceptualized as complete takings of leasehold interests. See *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 318–19 (1987).

CONCLUSION

The Court should grant certiorari, because the correct application of Takings Clause protections to appropriative water rights is essential to ensure the people of California and the other western states can continue to live and thrive in the unique conditions of the arid West.

Respectfully submitted,

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