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 ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as amicus curiae in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

The Fifth Amendment's Just Compensation (or takings) Clause recognizes that private ownership of property, and in turn, economic liberty, is intrinsic to our nation's social fabric. ALF has participated as amicus curiae in many cases where, as here, overly aggressive, and indeed avaricious, governmental action raises serious taking concerns.

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[1] Petitioner's and Respondent's counsel were provided timely notice of this brief in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or in part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

This is such a case. The question presented—whether the federal government's taking or impairing of a private party's ability to make beneficial use of its vested water rights should be analyzed as a regulatory taking rather than a per se or physical taking—squarely aligns with ALF's mission of advocating for protection of private property from unjust and uncompensated governmental actions.

INTRODUCTION

This Court has never analyzed the taking of any water right as a regulatory taking. And, other than the decisions below, no federal court has ever held that the taking of water rights should be analyzed as a regulatory taking. The decision below holds that the taking of Petitioner's water rights should be analyzed as a regulatory taking because the taking was not an actual physical appropriation of the water or did not require United Water to return water that it had already diverted. Unless reversed, this holding would result in the undoing of more than a century of decisions holding that the taking or impairment of the ability to make beneficial use of one's water right is analyzed as a per se or physical taking.[2]

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[2] A per se taking, also referred to as a "categorical taking," may arise in a regulatory context but its impact on property rights so closely mirrors a classic physical taking that "'courts . . . apply a clear rule.'" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 323 (2002). (quoting *Yee v. Escondido,* 503 U.S. 519, 523 (1992)). Where, however, a regulation merely prohibits certain private uses, a court's analysis "'necessarily entails complex factual assessments of the purposes and

SUMMARY OF ARGUMENT

The Federal Circuit's decision conflicts with more than a century of precedent recognizing water rights as compensable property and treating government appropriations or compelled redistributions of the right to use water as a per se, physical taking—not a regulatory taking.

This Court has consistently analyzed takings of water rights under the per se or physical taking framework in cases such as *International Paper,*[3] *Gerlach*,[4] and *Dugan*,[5] without requiring a government seizure of already-diverted water or a physical occupation of land. The court below misread these decisions by limiting per se treatment to an actual physical appropriation or to the taking of riparian rights—a limitation found nowhere in this Court's holdings.

In *International Paper*, the government requisitioned all of the electricity generated by a hydropower company, which in turn cut off a paper company mill's water supply. This government's requisition—a regulatory action—was held to be a per

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economic effects of government actions.'" *Tahoe-Sierra*, 535 U.S. at 323 (quoting *Yee*, 503 U.S. at 523).

[3] *Int'l Paper Co. v. United States*, 282 U.S. 399 (1931).

[4] *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

[5] *Dugan v. Rank*, 372 U.S. 609 (1963).

se taking of the paper company's water rights.[6] *Dugan* flatly rejected any requirement of physical invasion, or appropriation equating the government's upstream interference with downstream water rights to overflight takings.[7] *Gerlach* similarly treated the government's newly adopted plan of operations—a regulatory action—which reduced adjacent plaintiffs' farm lands to dried, parched land, as a per se taking requiring just compensation, stating that "public interest requires appropriation; it does not require expropriation."[8]

The riparian/appropriative distinction, employed by the court below, played no role in the *Gerlach* and *Dugan* takings analyses, and all three cases could have easily been characterized as regulatory takings under the Federal Circuit's analysis. And, contrary to that analysis, California law recognizes that a state issued water rights permit is a usufructuary right that is vested property protected by the Just Compensation Clause.

Also contrary to the ruling of the court below, this Court's ruling in *Penn Central*[9] did not overrule and does not justify jettisoning a long-standing physical takings rule for water rights taking cases. The regulatory takings framework long predates

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[6] *See Int'l Paper*, 282 U.S. at 407.

[7] *See Dugan*, 372 U.S at 625.

[8] *Gerlach*, 339 U.S. at 753.

[9] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

these decisions and did not displace the per se analysis applied to appropriations of core property interests, such as the right to use water. Consistent with *International Paper*[10] and this Court's water rights takings jurisprudence, the Federal Circuit in *Casitas Municipal Water District v. United States*,[11] held that a government-compelled diversion of water for Endangered Species Act (ESA) purposes constitutes a physical appropriation of a usufructuary right, regardless of who turns the valve.[12] *Casitas* does not support the holding reached here.

In *United Water*,[13] as in *Casitas*, NMFS's Biological Opinion required United Water to reallocate substantial quantities of water to a fish ladder and to maintain flows in the river to benefit fish, depriving United Water of roughly 49,800 acre-feet otherwise available for beneficial use[14]—facts that fit squarely within the per se framework.

This case presents a consequential error with enormous ramifications for the agricultural community, which has invested countless dollars over the decades in founding and sustaining their family-owned farms. The decision below invents a novel rule

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[10] *See Int'l Paper*, 282 U.S. at 407.

[11] *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008).

[12] *Casitas*, 543 F.3d at 1283.

[13] Pet. App 1a–14a.

[14] *See id.* at 4a.

that relegates government appropriations of water rights to being analyzed under the multi-factor, ad hoc factual analysis suitable for regulatory takings of land under *Penn Central* and imposes a burdensome regulatory requirement not required to ripen any other water rights taking case.

Review is warranted to restore uniform adherence to this Court's takings precedents and to reaffirm that the per se or physical takings ruling applies whenever government actions deprive a water rights holder of the ability to make beneficial use of its water rights.

ARGUMENT

I. This Court Has Consistently Analyzed the Government's Appropriation of a Right to Use Water as a Per Se Taking

This Court has never analyzed any water rights takings case as a regulatory taking. Instead, the Court has always analyzed the taking of water rights using the per se taking test.[15] And none of those rulings required that there be a physical appropriation or seizure of water for the taking to be analyzed as a per se taking.

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[15] *See*, *e.g.*, *Gerlach,* 339 U.S. 725 (analyzing government taking of water owed to claimants under water delivery contracts as physical taking); *see also Dugan*, 372 U.S. 609; *Int'l Paper*, 282 U.S. 399.

Until the decision below, the Federal Circuit too has held that the taking of water rights is analyzed as a per se taking.[16] The trial court, the U.S. Court of Federal Claims, has also consistently held that the taking of water rights is analyzed as a per se taking.[17] And under California law, the taking of water rights is analyzed as a per se taking.[18]

A. The court below misread this Court's rulings in the leading water rights taking cases: *International Paper*, *Gerlach*, and *Dugan*

The court of appeals erroneously held that the physical or per se taking test did not apply here, limiting the per se test to apply only when the government physically appropriates the water or requires the water rights holder "'to return water it

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[16] *See*, *e.g.*, *Casitas*, 543 F.3d at 1297 n.17 (holding that the taking of Casitas's water rights was "properly analyzed under a physical taking rubric").

[17] See, e.g., *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 319 (2001) ("[B]y preventing plaintiffs from using the water to which they would otherwise have been entitled, have rendered the usufructuary right to that water valueless, they have thus effected a physical taking."); *see also Klamath Irrigation v. United States*, 129 Fed. Cl. 722 (2016); *Baley v. United States*, 134 Fed. Cl. 619, 660-66 (2017).

[18] *See San Bernardino Valley Mun. Water Dist. v. Meeks & Daley Water Co.*, 226 Cal. App. 2d 216, 223, (Cal. App. 1964) (taking of a shareholder's right to receive water "amounts to the taking of a shareholder's property without just compensation, in violation of both the State and Federal Constitutions").

had already diverted.'"[19] The court mischaracterized the leading water rights cases, *International Paper*,[20] *Gerlach*,[21] and *Dugan*,[22] reading these cases to support its new limited takings rule.

The court below found that the per se taking in *International Paper* turned on the finding that the government "completely cut off [the paper company's] access to the water[.]"[23] And the court concluded that the per se takings in *Gerlach* and *Dugan* were because the water rights were riparian.[24] The court also concluded that none of the cases even considered whether the taking was regulatory because this Court had not yet decided *Penn Central*,[25] which the court described as having clarified the regulatory taking test announced in *Pennsylvania Coal Co. v. Mahon*.[26]

Otherwise, under the lower court ruling, the taking of water rights is to be analyzed as a regulatory

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[19] Pet. App. 6a (quoting Pet. App. 38a).

[20] *Int'l Paper*, 282 U.S. 399.

[21] *Gerlach*, 339 U.S. 725.

[22] *Dugan*, 372 U.S. 609.

[23] Pet. App. 11a.

[24] *See id*. at 13a.

[25] *Penn Central*, 438 U.S. 104.

[26] *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922).

taking.[27] No holding of any federal court decision supports this newly announced rule.

1. Under the Federal Circuit's new water rights taking rule, even *International Paper*, *Gerlach*, and *Dugan* would be considered regulatory takings

None of this Court's three leading water rights cases involved a situation in which the water rights holder had to return water that had already been diverted. Not a single one involved an instance where the federal government physically appropriated the water rights holder's water. What unifies all three cases is that in each case the government appropriated, by a requisition order or a plan of operations for a dam, the water rights holder's right to use or divert the water for its own beneficial use.

In *International Paper*, the government had requisitioned the output of a hydroelectric power plant on the Niagara River during World War I.[28] The paper company, however, had a contract from the permit holder to receive a portion of the water from the same canal that the power company received its water.[29] By taking the output of the hydroelectric plant, the government also cut off the water flow to

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[27] *Id*.

[28] *See Int'l Paper*, 282 U.S. at 405–406.

[29] *See id*. at 405.

International Paper's sawmill.[30]

The Court held that this mandatory diversion of water was a per se taking of plaintiff's right to receive water. The requisition and redistribution of hydropower by order of the Secretary of War resulted in a taking of International Paper's water rights.[31]

The action that gave rise to the taking in *International Paper* was a government requisition of the electric company's hydroelectric power that temporarily interrupted the paper company's water supply for its sawmill. The government did not take over the operations of either Niagara Power or International Paper, nor did it physically direct the flow of the water. And, importantly, the government did not require the paper company to return any water to the power company. The government merely directed Niagara Power to distribute *the electricity* to certain of its customers.[32] Under the court below's reasoning, *International Paper* should have been analyzed as a regulatory taking.

Likewise, in *Dugan*,[33] the U.S. Bureau of Reclamation adopted an operations plan for the Friant Dam that would diminish water available to water rights holders, who sued for a taking. The Court again analyzed the government action as a per se or

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[30] *Id*. at 405–406.

[31] *Id*. at 408.

[32] *Id*. at 407.

[33] *Dugan*, 372 U.S. 609.

physical taking of the plaintiffs' water flows. Comparing the taking of water rights to the taking of land by overflight, the *Dugan* court held that a physical invasion was not required to establish a per se taking:

> A seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here. Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land[.][34]

But under the court below's holding, because the government did not "completely cut off"[35] the plaintiffs' water rights in *Dugan*, the case would be analyzed as a regulatory taking.

The Court's decision in *Gerlach* also involved a regulation—the government's operation plan for the Friant Dam. In *Gerlach*, implementation of that plan meant that, except in "rare intervals, there will be no spill over Friant Dam, the bed of the San Joaquin along claimants' lands will be parched, and their grass lands will be barren."[36] The Court stated that

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[34] *Id*. at 625 (citing *Griggs v. Allegheny County*, 369 U.S. 84, 89–90 (1962); *United States v. Causby*, 328 U.S. 256, 261–263, 267 (1946); and *Portsmouth Co. v. United States*, 260 U.S. 327, 329 (1922)).

[35] Pet. App. 11a.

[36] *Gerlach*, 339 U.S. at 730.

Gerlach's "claim of right" is "to enjoy natural, seasonal fluctuation unhindered, which presupposes a peak flow largely unutilized."[37]

There is no hint that this Court applied any taking test other than a per se taking test in *Gerlach*. Instead, the Court emphasized that "[n]o reason appears why those who get the waters should be spared from making whole those from whom they are taken. Public interest requires appropriation; it does not require expropriation."[38]

2. That the water rights were riparian did not figure into the Court's taking analysis in *Gerlach* and *Dugan*

The court below held that *Gerlach* and *Dugan* did not apply to the taking of United Water's property (water) rights because United Water held appropriative water rights, which the court below erroneously concluded did not become vested water rights until the water had actually been diverted for beneficial use. The court below found "significant" that the water rights at issue in *Gerlach* and *Dugan* were riparian water rights because riparian rights "exist by virtue of land ownership" and their acquisition does not "depend on any physical acts of diversion and beneficial use of water as is required for

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[37] *Id*.

[38] *Id*. at 752–53.

appropriative water rights."[39]

But, as discussed in this brief, since 1914 appropriative water rights cannot be obtained by physical diversion—only by a state-issued permit—and diversion before first obtaining a permit (like United's) is not legal under California law.[40]

The court below therefore erroneously concluded that only appropriative water-rights holders who had physically diverted their water rights are eligible for the physical taking rule to apply.[41]

More importantly, in neither decision did the Court indicate that its holding was based on the fact that the water rights were riparian, as opposed to appropriative. In fact, both cases discuss that appropriative water rights were also the subject of federal condemnation actions.[42]

In short, the court below simply invented out of whole cloth a rationale for its new rule.

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[39] Pet. App. 13a.

[40] *See United States v. Fallbrook Pub. Util. Dist.*, 165 F. Supp. 806, 830 (S.D. Cal. 1958).

[41] *See* Pet. App. 13a.

[42] *See*, *e.g.*, *Gerlach*, 339 U.S. at 754; *see also Dugan*, 372 U.S. at 625.

3. Although *Penn Central* identified relevant factors for ad hoc, fact-based inquiry for analyzing takings, that case did not overrule its earlier water rights decisions

In its opinion below, the court suggested that *International Paper*, *Gerlach*, and *Dugan* were not analyzed as regulatory taking cases because the Court had not yet "clarified" when a regulatory taking went "too far" so as to constitute a compensable taking.[43]

That this Court analyzed its three leading water rights taking cases as per se takings because it lacked the constitutional framework to do otherwise lacks any support in takings jurisprudence.

The regulatory taking test was first announced by Justice Holmes in 1922, in the seminal case *Pennsylvania Coal Co. v. Mahon*,[44] a case in which a Pennsylvania statute eliminated the company's ability to mine coal near support structures on its property. Writing for the Court, Justice Holmes stated that "while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking."[45] Because the statute had the effect of "appropriating or destroying [the coal's

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[43] *See* Pet. App. 13a (internal quotations omitted).

[44] *Pennsylvania Coal*, 260 U.S. 393.

[45] *Id.* at 415.

value,]"[46] the Court held that the statute had gone too far.

Justice Brennan in his now-famous dissent in *San Diego Gas & Electric Co. v. San Diego*,[47] described the *Pennsylvania Coal* decision as the touchstone of takings analysis.[48] Later, writing for the Court in 1978, Justice Brennan declared, based on his survey of fifty years of takings jurisprudence, that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[49]

Penn Central's three factors were not identified as a regulatory taking test, but instead as "guideposts" as part of an overall fact-based, ad hoc inquiry in determining whether the Fifth Amendment has been violated.[50] The Court did not discuss water rights taking cases nor did the Court indicate that it was overruling any prior decision in which any per se or physical taking tests had been applied. Notably,

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[46] *Id.* at 414.

[47] *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

[48] *Id*. at 649–50 (Brennan, J., dissenting).

[49] *Penn Central*, 438 U.S. at 124.

[50] *See Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring).

even in *Penn Central*, the Court focused its conclusion that no taking had occurred on one significant fact: no economic harm had occurred because the company could operate the Station profitably even without the permit and the company could transfer its air rights to another property it owned downtown.[51]

More importantly, the *Penn Central* formula has never been applied to recent water rights takings cases. As the Federal Circuit itself has stated "[i]n the context of water rights, courts have recognized a physical taking where the government has physically diverted water for its own consumptive use or decreased the amount of water accessible by the owner of the water rights."[52]

In short, there is no support for the argument that under *Penn Central*, the decisions in *International Paper, Gerlach*, and *Dugan* are no longer good law.

B. The court below misread its own ruling in *Casitas*

In both *United Water* and *Casitas*, the Biological Opinion required the water district to reduce the quantity of water it was authorized to use by its permit to increase the river flows available for the endangered fish.[53] The only factual difference

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[51] *See Penn Central*, 438 U.S. at 134–35.

[52] *Washoe Cnty., Nev. v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003).

[53] *See Casitas*, 543 F.3d at 1291–92; *and see* Pet. App. 2a–4a.

between the two cases was that, as constructed, Casitas' fish ladder was fed by water from its diversion canal while United's was fed directly by water flowing through the dam. The key question in this case is whether that happenstance of fish ladder construction makes a constitutional difference.

The court below found that the government-imposed water-use requirements imposed on the water rights holder were merely "regulatory restrictions"[54] that did not involve a direct appropriation of water as occurred in *Casitas Municipal Water District v. United States*, which the court relied on for reaching its decision that the taking was regulatory.[55] But under the court below's decision, the taking of Casitas's water would likely be held to be a regulatory taking.

The government in both cases argued that the taking should be analyzed as a regulatory taking.[56] In *Casitas*, the government argued that it did not "seize, appropriate, divert, or impound" any water, but merely required water to be left in the stream.[57]

Based on these concessions, and comparing the *Casitas* taking with the facts in *International Paper*, the Federal Circuit found that the government

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[54] Pet. App. 12a (internal quotations omitted).

[55] *Id.*

[56] *Casitas*, 543 F.3d at 1283.

[57] *Id.* at 1290.

appropriated Casistas's right to use its own water for the government purpose of protecting an endangered fish, stating that "[t]herefore, we conclude that the government physically appropriated water that Casitas held a usufructuary right in."[58]

The *Casitas* court acknowledged that the government had not itself physically diverted the water:

> When the government forces Casitas to divert water away from the Robles-Casitas Canal to the fish ladder for the public purpose of protecting West Coast Steelhead trout, this is a governmental use of the water. The fact *that the government did not itself divert the water is of no import*.[59]

The government's actions in *United Water* and *Casitas* both involved regulatory restrictions on the water right holder's use of water under the federal Endangered Species Act,[60] by the National Marine Fisheries Service (NMFS). In both cases, the biological opinion required that both districts send downriver water they otherwise would have diverted and put to beneficial use, to protect an endangered fish species—the Southern California steelhead trout in *United Water*, and the West Coast steelhead trout

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[58] *Id.* at 1292.

[59] *Id.* at 1292–93 (emphasis added).

[60] See *id*. at 1282; *see also* Pet. App. 3a–4a.

in *Casitas*.[61]

NMFS issued a biological opinion that required United Water to increase water flowing through the fish ladder that United Water was required to construct.[62] United Water estimates that it lost, for fish protection purposes, 49,800 acre-feet of water that it otherwise would have diverted to the Freeman Diversion Canal and put to beneficial use.[63]

In *Casitas*, the court found that the government appropriated an average of 3,200 acre-feet per year of Casitas' water for fish protection purposes.[64]

The key difference between *Casitas* and this case is that in *Casitas*, the Federal Circuit relied on *International Paper*, *Gerlach*, and *Dugan* for "guidance" finding that in each case, the government required that the water be diverted or "caused water to be diverted away[,]"[65] and that the government's actions were analyzed as a per se takings.

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[61] *See Casitas*, 543 F.3d at 1282; *see also* Pet. App. 3a–4a.

[62] *See* Pet. App. 4a.

[63] *Id*.

[64] *See Casitas*, 543 F.3d at 1282, n.4.

[65] *See id*. at 1290.

C. The court below mistakenly concluded that appropriative water rights under California law do not vest as property rights until the water has been diverted

Mistakenly relying on the law as it existed a century ago, the court below erroneously asserted that "water rights are acquired by diverting water and applying it for a beneficial purpose."[66] Applying this erroneous legal principle to the facts of this case led the court below to the wrong conclusion—that "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[.]"[67] But, although "[p]rior to December 19, 1914, the effective date of the Water Commission Act . . . such method for appropriating water existed under California law and could result in a vested appropriative right[,]"[68] that has not been the law for more than a hundred years. To the contrary, "under the law of California since 1913, a valid water right by appropriation can be acquired only by filing an application with the state authorities and pursuing it through the steps required by law."[69]

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[66] Pet. App. 10a (internal quotations omitted).

[67] *Id*. at 13a.

[68] *United States v. Fallbrook Pub. Util. Dist.*, 165 F. Supp. 806, 830 (S.D. Cal. 1958).

[69] *People of the State of California v. United States*, 235 F.2d 647, 660 (9th Cir. 1956).

The statutorily required steps for obtaining a water right permit from the State Water Board include an application, notice to affected parties, and a hearing before the Board.[70] If the Board determines that unappropriated water is available, and the application is for a beneficial use and in the public interest, a permit is granted.[71] "The issuance of a permit gives the right to take and use water only to the extent and for the purpose allowed in the permit."[72]

United Water's State Water Resources Control Board permit defines how much water it may divert from the Santa Clara River; United's actual diversions from the River are irrelevant to defining its state-granted water right. "Post-1914 appropriators may possess water rights only through a permit or license issued by the Board, and their rights are circumscribed by the terms of the permit or license."[73] California Water Code § 1225 provides: "[N]o right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of this division."[74] California courts have interpreted 1225 to declare that the permit system—not actual appropriation—is "the

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[70] *See* Cal. Water Code §§ 1205, 1225.

[71] *See* Cal. Water Code §§ 1201, 1240, 1253, 1257.

[72] Cal. Water Code § 1381.

[73] *Millview Cnty. Water Dist. v. State Water Res. Control Bd.*, 229 Cal. App. 4th 879, 889 (2014).

[74] Cal. Water Code § 1225.

exclusive means of acquiring the right to appropriate or use water[.]"[75]

Here, "United's State Board-issued license and permit provide it with the right to appropriate and divert 144,630 acre-feet of Santa Clara River water per year at the Diversion dam and to put that amount of water to beneficial use."[76] The permit precisely defines the extent of United Water's right to withdraw water from the River—and so precisely defines United Water's property right. Whether a compensable Fifth Amendment taking occurred is determined by the extent to which Government action interfered with that property right—the quantity of water it is legally allowed to withdraw from the Santa Clara River. And it is the Government's interference with United Water's right to divert that quantity of water that constitutes the taking.

Contrary to the court below, United Water was not required to actually divert any water to create its water right. Just the opposite—until United Water received its permit it could not divert any water at all from the Santa Clara. For, without a permit authorizing the diversion, the diversion is unauthorized and subject to enforcement pursuant to Water Code sections 1052 and 1831.[77]

Because actual diversion of water cannot occur until after the State Board permit issues, authorizing

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[75] *People v. Shirokow*, 605 P.2d 859, 863 (Cal. 1980).

[76] Pet. App. 4a.

[77] *See* Cal. Water Code §§ 1052, 1831.

the diversion, the diversion plays no part in creating or defining the water right—or United Water's property right. The court below's reliance on this irrelevant factoid to determine Fifth Amendment liability rests on a glaring error of water law—leading it to wrongly decide the case.

Although actual diversion may once have created a California water right, this has not been true for more than a century: Initially, rights to appropriate water were acquired by actual diversion and use of the water.[78] Beginning in 1914, however, a statutory scheme has provided the exclusive method of acquiring appropriation rights.[79]

The issuance of a permit establishes an appropriative right as of the date of the application and grants the "right to take and use the amount of water specified in the permit until the issuance of a license . . . ."[80] The license is the last step in the process which "confirms the right" established by the permit.[81]

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[78] *See Shirokow*, 605 P.2d at 865.

[79] *Id.*

[80] Cal. Water Code § 1455.

[81] Cal. Water Code § 1610.

II. The Rationale Behind Treating the Taking of Water Rights as Per Se or Physical Takings Is Consistent With the Nature of the Water Right and the Court's Analysis of Other Discrete Interests in Property Such as Trade Secrets and Money

Courts have developed different taking rules for different forms of property that involve discrete interests in property or limited rights associated with the property interest such as easements, leases, contracts, trade secrets, pension plans, money, interest earnings, causes of action, business interests, and water rights. Courts have fashioned takings rules to be sufficiently flexible so as to accommodate the taking of the different rights associated with different forms of properties.[82]

The California water rights at issue in this case are a unique type of property, consisting not of ownership of the liquid itself, but rather merely of the right to use the water for a particular purpose. As the California Supreme Court explained nearly one hundred and fifty years ago, "[i]t is laid down by our law writers, that the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use."[83] From the earliest

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[82] *See Argent v. United States*, 124 F.3d 1277, 1283 (Fed. Cir. 1997) ("The Government ascribes to takings jurisprudence an inflexibility that does not exist."); *see also Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002) (en banc).

[83] *Eddy v. Simpson,* 3 Cal. 249, 252 (Cal. 1853) (emphasis added).

days of its statehood, California has recognized that an appropriative water right is a private property right, subject to ownership and disposition by the owner as in the case of other private property.[84] The right to the use of water is "regarded and protected as property" and is "substantive and valuable property."[85] As such, they cannot be infringed by others or taken by governmental action without due process and just compensation.[86]

Regulatory taking rules make perfect sense when applied to land, which has many sticks within its bundle of rights. But water rights are diametrically different from land, in that the sticks in its bundle of rights are more limited; as a usufruct the rights include a use right, and in some instances, the right to divert or store the water for later beneficial use.

As this Court explained in *Loretto v. Teleprompter Manhattan CATV Corp.*, the taking "chops through the bundle, taking a slice of every

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[84] Wells A. Hutchins, THE CALIFORNIA LAW OF WATER RIGHTS 120–121 (1956); *see also id.* at 37.

[85] *Id.* at 121 (*citing Kidd* v. *Laird,* 15 Calif. 161, 179–180 (1860) and *McDonald* v. *Bear River* & *Auburn Water* & *Min. Co.,* 13 Calif. 220, 232 (1859)).

[86] *United States v. State Water Resources Control Bd.,* 182 Cal. App.3d 82, 101 (1986) (citing *Ivanhoe Irrigation Dist. v. All Parties,* 47 Cal. 2d 597, 623 (1957), *rev'd. on other grounds in Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275 (1958), and *Gerlach,* 339 U.S. 725, 752–754)).

strand"[87] and constitutes a per se violation of the Just Compensation Clause. But with water, a taking slices through a bundle of just one stick—the right to use the water. In real property terms, when the government takes a water right it absolutely dispossesses the owner and renders the water right estate valueless to the owner.[88]

In *Brown v. Legal Foundation of Washington*,[89] a case involving the taking of interest on lawyers' IOLTA accounts, the issue before the Court was whether a per se or *Penn Central* analysis should be used to analyze the regulatory requirement that interest on lawyers' trust accounts be transferred to a public legal foundation. The government argued there, as it does here, that no physical occupation had occurred, and that therefore *Penn Central* analysis was required. Rejecting the government's argument, the Court explained:

> We agree that a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*'s ad hoc analysis. As was made clear in *Phillips*, the interest earned in the IOLTA accounts "is the 'private property' of the owner of the principal." 524 U.S., at 172. If this is so, the transfer of the

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[87] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

[88] *Allegretti & Co. v. Cnty. of Imperial*, 138 Cal. App. 4th 1261, 1274 (2006).

[89] *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003).

> interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto*.[90]

In *Ball v. United States*,[91] the Court of Claims summed up the rule on the taking of water rights: "In general terms, water rights in surface waters, whether riparian or appropriative, constitute property, and, under familiar principles, cannot be taken 'except for the public use and upon payment of just compensation.'"[92]

As one commentator stated:

> First, different kinds of property interests, such as ownership in fee, leaseholds, and easements, enjoy different kinds of rights. Among these different rights are some whose importance is so central to the property interest that the infringement of this "core" right will likely result in a per se

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[90] *Id.* at 235; *see also Hodel v. Irving*, 481 U.S. 704, 716 (1987) (regulation that "abolishes both descent and devise" of interests in land is a per se taking); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (taking of a trade secret is a per se taking); *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 596–602 (1935) (taking of real estate lien analyzed as per se taking).

[91] *Ball v. United States*, 1 Cl. Ct. 180 (1982).

[92] *Id.* at 183 (quoting 2 NICHOLS ON EMINENT DOMAIN § 5.79 (3d ed., rev. 1981)); *see also Store Safe Redlands Associates v. United States*, 35 Fed. Cl. 726, 730 (1996) (concluding that the alleged taking of plaintiff's water rights "share[d] many commonalities with the so-called physical taking").

> treatment of the taking, similar to a physical or categorical taking.
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> ***
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> This accepted recognition of core rights with regard to property rights in land justifies the same outcome with regard to property rights in water. A water right, like other property interests, enjoys different rights and among these different rights is the core right – the right to use.
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> ***
>
> Thus, the right to use, the chief characteristic of a water right, necessarily includes the right to exclude others from using the water, similar to a landowner's right to exclude others from entering his property.[93]

The rationale for applying a per se rule for physical occupation of real property is that such action often boils down to a fundamental notion of protecting an individual's right to exclude others.[94] In the context of water rights, denying the water rights owner the use of the water destroys the sole stick in the bundle of property rights, and likewise destroys

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[93] Jesse W. Barton, *Tulare Lake Basin Water Storage Dist. v. United States: Why It Was Correctly Decided and What This Means for Water Rights*, 25 ENVIRONS ENVTL. L. & POL'Y J. 109, 130–32 (2002).

[94] *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021).

the water rights holder's right to exclude others—notably, the government—from using its water.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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November 28, 2025

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