No. 25-523

In the Supreme Court of the United States

UNITED WATER CONSERVATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the complaint in this case, which alleges that the government restricted petitioner's use of water from a river, fails to state a Fifth Amendment claim for a physical taking of property.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 133 F.4th 1050. The opinion of the Court of Federal Claims (Pet. App. 15a-40a) is reported at 164 Fed. Cl. 79.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2025. A petition for rehearing was denied on July 29, 2025 (Pet. App. 41a-43a). The petition for a writ of certiorari was filed on October 27, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Santa Clara River rises in the San Gabriel Mountains and flows west through Southern California into the Pacific Ocean. *Wishtoyo Found.* v. *United Water Conservation Dist.*, No. 16-cv-3869, 2018 WL 6265099,

at *1 (C.D. Cal. Sept. 23, 2018) (*Wishtoyo I*), aff'd, 795 Fed. Appx. 541 (9th Cir. 2020). The River provides habitat for Southern California steelhead trout, a type of anadromous fish. *Id.* at *2 & n.6. Steelhead trout hatch in freshwater upstream, migrate to the ocean to mature, and return to freshwater as adults to spawn. *Id.* at *2.

Petitioner is a water conservation district, formed under California law to serve as the water management agency for the Santa Clara River and the Oxnard coastal plain. Compl. ¶¶ 1, 13.* In California, "running waters cannot be owned—whether by a government or by a private party." *Sturgeon* v. *Frost*, 587 U.S. 28, 42 (2019); see Cal. Water Code § 102. But "the right to the *use* of water may be acquired by appropriation in the manner provided by law." Cal. Water Code § 102 (emphasis added). Petitioner has acquired such a usufructuary right under California law. Compl. ¶ 14. As authorized by a license and a permit issued by the State Water Resources Control Board, petitioner may appropriate and divert from the River up to 144,630 acre-feet of water per year for beneficial use, although it has historically diverted much less. *Ibid.*; see Compl. ¶ 21 ("Between 1991 and 2014, annual diversions at the [Dam] averaged nearly 71,000 [acre-feet].").

In 1987, petitioner's state permit was amended to allow the construction of the Vern Freeman Diversion Dam. Compl. ¶ 22. The federal Bureau of Reclamation (Reclamation) loaned petitioner funds to build the Dam, which was completed in 1991. Compl. ¶¶ 24, 30; *Wishtoyo I*, 2018 WL 6265099, at *7. The Dam is a 1200-foot-wide concrete structure spanning the width of the Santa Clara River

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* Because this case arises on a motion to dismiss, this brief assumes the truth of the allegations in the complaint. See *National Rifle Ass'n* v. *Vullo*, 602 U.S. 175, 181 (2024).

approximately 10.5 miles from the Pacific Ocean. *Wishtoyo I*, 2018 WL 6265099, at *7. Petitioner uses the Dam to divert water from the River into the Freeman Diversion Canal. Compl. ¶ 15. The diverted water is then put to beneficial use by petitioner and its constituents. Compl. ¶¶ 1-2, 19. Water that is not diverted into the Canal remains in the River and flows to the Pacific Ocean. Compl. ¶ 18. That water is known as "bypass flow." Compl. ¶ 4.

When petitioner's state permit was amended in 1987, it was understood that the operation of the Dam, as well as petitioner's diversion of water, would affect the migration of steelhead trout. Compl. ¶¶ 22-25; see *Wishtoyo I*, 2018 WL 6265099, at *2-*3. To protect that migration, the amended permit required that the Dam's construction include a fish ladder to assist returning steelhead trout in swimming upstream, past the Dam. Compl. ¶¶ 22, 24. The amended permit also mandates a specified level of bypass flow to the Pacific Ocean to help ensure that there is sufficient water downstream for migration. Compl. ¶¶ 22, 25, 29; see *Wishtoyo I*, 2018 WL 6265099, at *2. For example, the amended permit requires petitioner to "commence[]" bypass flow of 40 cubic-feet per second (cfs) when "total Santa Clara River volume exceeds 515 cfs." Compl. ¶ 25. After the permit was amended, petitioner "decided to increase" bypass flow "to either 120 cfs when the total Santa Clara River flow is at or above 280 cfs, or one-half of the river flow when the total Santa Clara River flow is under 280 cfs." Compl. ¶ 28.

2. In 1997, the Secretary of Commerce (Secretary), acting through the National Marine Fisheries Service (NMFS), listed Southern California steelhead trout as endangered under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.* See 62 Fed. Reg. 43,937 (Aug. 18, 1997). Section 9 of the ESA prohibits the "take"

of any species that is listed as endangered. 16 U.S.C. 1538(a)(1)(B). The term "take" includes harming, harassing, capturing, or killing the species. 16 U.S.C. 1532(19). By issuing an incidental-take permit under Section 10 of the ESA, the Secretary may authorize a taking that Section 9 would otherwise prohibit. The Secretary may issue such a permit "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," and if the Secretary makes other specified findings. 16 U.S.C. 1539(a)(1)(B); see 16 U.S.C. 1539(a)(2).

Granting an exemption under Section 7 of the ESA is another means by which the federal government may authorize a taking that Section 9 would otherwise prohibit. 16 U.S.C. 1536(*o*). Section 7 requires each federal agency to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species." 16 U.S.C. 1536(a)(2). If an agency determines that an action is likely to adversely affect a listed species, it must engage in formal consultation with NMFS, which must provide a written statement (known as a biological opinion) that explains how the action will affect the species or its habitat. 16 U.S.C. 1536(b)(3)(A). If NMFS determines that the action is likely to jeopardize the continued existence of a listed species, the biological opinion must identify "reasonable and prudent alternatives" (RPAs) that NMFS believes will avoid that likelihood. *Ibid.* The biological opinion must also include an incidental-take statement setting forth "reasonable and prudent measures," which, if implemented, would exempt the action from Section 9's prohibition on takings. 16 U.S.C. 1536(b)(4); see 16 U.S.C. 1536(*o*).

In 2005, Reclamation commenced consultation with NMFS under Section 7 of the ESA to ensure that the

Dam, whose construction Reclamation had funded, was not likely to jeopardize the continued existence of the steelhead trout. Compl. ¶ 30. In July 2008, NMFS issued a proposed biological opinion, which found that the Dam was likely to jeopardize the continued existence of the species, and which identified two RPAs—"RPA 1, dealing with fish passage, and RPA 2, dealing with bypass flow"—that NMFS believed would avoid that harm. Compl. ¶ 31. "In turn, the bypass flow RPA was broken down into two component RPAs, RPA 2A and RPA 2B." *Ibid.* RPA 2A would have required a specified level of bypass flow to facilitate *adult* steelhead migration downstream of the Dam, while RPA 2B would have required a specified level of bypass flow to facilitate *juvenile* steelhead migration downstream of the Dam. *Ibid.* The bypass-flow requirements would have applied only under specified conditions; RPA 2A, for example, would have applied only "during the principal steelhead migration season (January through May) when total river discharge is ≤ 750 cfs." *Wishtoyo I*, 2018 WL 6265099, at *26; see Compl. ¶ 31.

Several months after NMFS issued the proposed biological opinion, Reclamation's involvement with the Dam ended. Compl. ¶ 33. Reclamation terminated the Section 7 consultation process without adopting the proposed biological opinion. *Ibid.*; see *Wishtoyo I*, 2018 WL 6265099, at *28.

3. In June 2016, Wishtoyo Foundation and other environmental groups filed a citizen suit in federal district court, alleging that petitioner was engaged in the unauthorized take of steelhead trout, in violation of Section 9 of the ESA. Compl. ¶ 47. Shortly thereafter, NMFS sent petitioner a letter about "a significant issue regarding the ongoing take" of endangered steelhead trout at the

Dam. C.A. App. 53. The letter expressed the "opinion" of "NMFS staff" that petitioner's operation of the Dam had "annually resulted in take" of steelhead trout, without an incidental-take permit. *Id.* at 54. In a section entitled "Recommendation," the letter identified the measures that "NMFS believe[d]" petitioner should adopt "[i]n order to be effective in protecting" the steelhead trout "pending issuance of an incidental take permit." *Id.* at 55 (emphasis omitted). Those measures included RPA 2 of the 2008 proposed biological opinion. *Ibid.* The letter closed by "encourag[ing] petitioner in the strongest terms possible" to implement those measures, and by warning petitioner that "NMFS intend[ed] to pursue legal options available under the ESA" "[a]bsent a firm commitment" by petitioner to do so. *Ibid.*

In August 2016, petitioner responded to the letter by stating that it would implement RPA 2A but would "refuse[] to comply" with RPA 2B. Compl. ¶ 44. The following month, NMFS sent petitioner a further letter, which petitioner read as indicating that the agency had misunderstood petitioner to have stated that it would implement RPA 2B as well. Compl. ¶ 45. Petitioner then implemented "both RPA 2A and 2B." Compl. ¶ 46.

Meanwhile, the *Wishtoyo* litigation, to which the federal government was not a party, proceeded to a bench trial. Compl. ¶ 48; see *Wishtoyo I*, 2018 WL 6265099, at *4. In September 2018, the district court found that, without an incidental-take permit, petitioner's operation of the Dam constituted an unauthorized take of steelhead trout, in violation of Section 9 of the ESA. Compl. ¶ 49; see *Wishtoyo I*, 2018 WL 6265099, at *77. In a subsequent order entering final judgment, the district court issued a permanent injunction that requires petitioner to implement RPA 2 until it obtains incidental-take authori-

zation from NMFS. Compl. ¶ 50; see *Wishtoyo Found.* v. *United Water Conservation Dist.*, No. 16-cv-3869, 2018 WL 7571315, at *1 (C.D. Cal. Dec. 1, 2018). The Ninth Circuit affirmed, Compl. ¶ 51; see *Wishtoyo Found.* v. *United Water Conservation Dist.*, 795 Fed. Appx. 541 (2020), and the permanent injunction remains in place today.

4. In 2022, petitioner sued the United States in the Court of Federal Claims (CFC) under the Tucker Act, 28 U.S.C. 1491(a)(1). Compl. ¶ 7. Petitioner asserted that NMFS's 2016 letter had "compel[led]" it to implement RPA 2 of the proposed biological opinion, Compl. ¶ 63; that by implementing RPA 2, petitioner had "increased the volume of bypass flow" through the Dam, Compl. ¶ 64; that the "increased amount" of bypass flow was "water" that petitioner had a "right to appropriate and divert from the Santa Clara River for [petitioner's] beneficial use," Compl. ¶ 67; and that by "compell[ing]" petitioner to increase bypass flow, the United States had "taken" that "water" for "public purposes under the ESA," *ibid.* Petitioner alleged that it had suffered a "physical taking" of its property, *ibid.*, and that it was entitled under the Fifth Amendment's Just Compensation Clause to $40 million for the loss of at least 49,800 acre-feet of water, Compl. ¶¶ 53, 58.

The CFC granted the United States' motion to dismiss petitioner's complaint. Pet. App. 15a-40a. The court held that petitioner had "fail[ed] to state a viable claim" for a physical taking. *Id.* at 40a. The court explained that "[a] physical taking occurs when the government directly appropriates property or 'engages in the functional equivalent of a practical ouster of the owner's possession,'" whereas "a regulatory taking occurs when a regulation goes too far." *Id.* at 33a (brackets and citation omitted). The court observed that petitioner "does not

allege that water that was already diverted into its diversion canal was required to be returned to the river." *Id.* at 37a. Rather, the court emphasized, petitioner "states that, to comply with the ESA and protect the endangered steelhead trout, water it *otherwise could have diverted* under its license and permit was used 'as bypass flow into the Diversion dam fish ladder and/or remained in the river.'" *Ibid.* (brackets omitted) (quoting Compl. ¶ 6). The court concluded that, "[b]ecause [petitioner] does not allege that it had to return water it had already diverted, it has not stated a physical takings claim." *Id.* at 37a-38a.

5. The Federal Circuit affirmed. Pet. App. 1a-14a. The court of appeals agreed with the CFC that petitioner had failed to state a physical-takings claim. *Id.* at 11a-14a. The court observed that petitioner "has not alleged that the government completely cut off its access to the water or caused it to return any volume of water it had previously diverted to its possession in the Freeman Canal." *Id.* at 11a. "In fact," the court noted, "[petitioner] alleges that NMFS, at most, required more water to stay in the Santa Clara River." *Ibid.* (citing Compl. ¶¶ 4, 18). The court thus described the RPAs as "nonpossessory government activity merely requiring that more Santa Clara River water * * * remain[] in the river." *Id.* at 12a. The court of appeals concluded that the "RPAs therefore operate as 'regulatory restrictions on the use of' a natural resource and 'do not constitute physical takings.'" *Ibid.* (citation omitted).

6. The court of appeals denied rehearing en banc without noted dissent. Pet. App. 41a-43a.

ARGUMENT

Petitioner's complaint alleges that the government restricted petitioner's use of water from the Santa Clara

River. The court of appeals correctly held that those allegations do not state a claim for a physical taking under the Fifth Amendment, and its decision does not conflict with any decision of this Court or another court of appeals. In any event, this case would be a poor vehicle for the Court's review because petitioner's framing of the question presented rests on the erroneous premise that the government imposed a compulsory restriction on petitioner's diversion of water. The petition for a writ of certiorari should be denied.

1. Petitioner alleges that a letter sent by NMFS in 2016 caused petitioner to divert less water from the Santa Clara River than it otherwise might have. Compl. ¶ 67. Even if the letter had compelled that result, NMFS's action would not have effected a physical taking. Pet. App. 11a-13a. Rather, it would have merely restricted petitioner's use of water from the River. Compl. ¶ 67. Such a "use restriction" may effect a taking only if it satisfies this Court's test for "'regulatory takings.'" *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 148-149 (2021) (citation omitted). And petitioner has disclaimed any regulatory-takings claim in this case. See Pet. C.A. Br. 17 n.2 ("[Petitioner] did not contest below, and does not contest in this appeal, that its Complaint does not state a *regulatory* takings claim that is ripe for adjudication."). Accordingly, the court of appeals correctly affirmed the dismissal of petitioner's complaint. Pet. App. 2a.

a. The Just Compensation Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. Under this Court's precedents, the standard for determining whether a governmental action effects a taking depends on the nature of the action.

"When the government physically acquires private property for a public use," the Court applies "a simple, *per se* rule: The government must pay for what it takes." *Cedar Point*, 594 U.S. at 147-148. "The government commits a physical taking when it uses its power of eminent domain to formally condemn property." *Id.* at 147. "The same is true when the government physically takes possession of property without acquiring title to it." *Ibid.* "And the government likewise effects a physical taking when it occupies property." *Id.* at 148.

"When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies." *Cedar Point*, 594 U.S. at 148. "To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed" in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), "balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." *Cedar Point*, 594 U.S. at 148. Under that test, "use restrictions that go 'too far'" are known as "'regulatory takings.'" *Id.* at 149 (citation omitted).

Here, petitioner alleges that NMFS's 2016 letter caused it to divert less water from the Santa Clara River than it otherwise might have. Compl. ¶ 67. Even if the letter is read as *compelling* petitioner to divert less water, the letter did not achieve that result by physically appropriating any property that petitioner owned. After all, water flowing down the River "cannot be owned—whether by a government or by a private party." *Sturgeon* v. *Frost*, 587 U.S. 28, 42 (2019); see Cal. Water Code § 102. And on petitioner's own account, the letter simply

"required more water to stay in" the River. Pet. App. 11a (citing Compl. ¶¶ 4, 18).

NMFS's 2016 letter therefore did not cause the government to physically occupy, invade, or possess any property that petitioner owned. Rather, even accepting petitioner's view that the letter had binding effect, the letter merely limited petitioner's "right to the *use* of" the River's flows. Cal. Water Code § 102 (emphasis added). The alleged limitation on that usufructuary right is a classic "use restriction[]." *Cedar Point*, 594 U.S. at 148.

This Court's precedents illustrate that point. In *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958), the Court considered a governmental directive "ordering nonessential gold mines to close down." *Id.* at 156. Mining companies sued, alleging that the directive had effected a "taking" of their "rights to operate their respective gold mines." *Ibid.* The Court held that the order had not effected a physical taking because "the Government did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them." *Id.* at 165-166. Instead, the Court analyzed the order "barring the mining of gold" under the framework that "applies to use restrictions." *Cedar Point*, 594 U.S. at 148 (citing *Central Eureka*, 357 U.S. at 168).

The Court likewise applied that framework in *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987). The regulation in that case "require[d] 50% of the coal beneath" certain structures "to be kept in place as a means of providing surface support." *Id.* at 477. Coal-reserve owners sued, alleging that the regulation required them "to leave approximately 27 million tons of coal in place," thereby "appropriat[ing]" that coal for "public purposes" without just compensation. *Id.* at 498.

The Court rejected the suggestion that the plaintiffs' "coal ha[d] been physically appropriated." *Id.* at 499 n.27. The Court explained that the case "involve[d] land use regulation, not a physical appropriation of [the owners'] property." *Id.* at 489 n.18. The Court therefore analyzed the regulation under the standard that applies to regulatory takings. *Id.* at 485.

Although this case involves water use, not land use, the same principle applies here. Whether "a use restriction effects a taking" depends on "the flexible test developed in *Penn Central*," not the "*per se* rule" that applies to physical appropriations. *Cedar Point*, 594 U.S. at 148. Indeed, the plaintiffs in *Central Eureka* and *Keystone* owned the gold mines and the coal, but the Court still declined to treat the regulations that prevented them from using those resources as a physical appropriation of their property. Since petitioner does not even own the water at issue here, see p. 10, *supra*, it follows *a fortiori* that an alleged regulation preventing petitioner from using that water is not a physical appropriation either.

b. Contrary to petitioner's contention (Pet. 18-27), the decision below does not conflict with any decision of this Court. Petitioner cites (Pet. 18-19) several decisions involving water rights, but none of them supports the view that the 2016 letter in this case should be analyzed as a physical taking. See Pet. App. 12a-13a (rejecting petitioner's reliance on those decisions).

International Paper Co. v. *United States*, 282 U.S. 399 (1931), involved a wartime requisition order that took "all of the water capable of being diverted through [a particular] canal," including all of the water that a paper company had a right to withdraw from the canal. *Id.* at 405. The Court held that the order effected a taking of the company's "water rights." *Id.* at 407. But in so hold-

ing, the Court did not specify whether it viewed the taking as a physical taking or as a regulatory one. Indeed, the Court did not address the distinction between those two types of takings at all. Instead, the Court explained that "when all the water that [the paper company] used was withdrawn from the [company's] mill and turned elsewhere by government requisition," "it is hard to see what more the Government could do to take the use." *Ibid.* Because the requisition order deprived the company of "*all* economically beneficial uses" of its water rights, the requisition order satisfied this Court's test for a regulatory taking. *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (quoting *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992), a regulatory-takings case).

The Court likewise did not address the distinction between physical and regulatory takings in either *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), or *Dugan* v. *Rank*, 372 U.S. 609 (1963). In each of those cases, the storing and diverting of water at a dam, which was part of a federal reclamation project, substantially diminished the flow of the San Joaquin River downstream. See *id.* at 610, 625; *Gerlach*, 339 U.S. at 727-728. To the extent the Court engaged in any takings analysis in either case, it did so only in dicta. See *Dugan*, 372 U.S. at 626 (making "clear that [the Court] do[es] not in any way pass upon or indicate any view regarding the validity of respondents' water right claims"). And in any event, the Court's reasoning was consistent with the view that operation of the dam had effected a regulatory, rather than a physical, taking of riparian rights downstream. In *Dugan*, for instance, the Court observed that the operation of the dam had deprived downstream water users of the "profitable use" of their riparian rights.

Id. at 625 (citation omitted); see *Gerlach*, 339 U.S. at 730 (explaining that "the bed of the San Joaquin along claimants' lands will be parched, and their grass lands will be barren," as a result of the dam). As in *International Paper*, the Court's reasoning thus suggested that any taking was a regulatory one.

Petitioner also contends (Pet. 20-27) that the decision below conflicts with this Court's decision in *Cedar Point*. But the *Cedar Point* Court reaffirmed that land-use regulations such as "zoning ordinances" and "orders barring the mining of gold" should be analyzed under the regulatory-takings framework. 594 U.S. at 148. And as explained above, there is no principled reason to apply a different framework to water-use regulations like the one alleged here. See p. 12, *supra*. If a regulation that required a coal-reserve owner to "leave approximately 27 million tons of coal in place" is not a physical taking, *Keystone*, 480 U.S. at 498, then an agency communication that allegedly required petitioner to leave 49,800 acre-feet of water in the River is not a physical taking either, see Compl. ¶ 53.

c. Petitioner's remaining arguments lack merit. Petitioner asserts that, if "the United States could not issue an uncompensated mandate that raisin growers surrender a portion of their produce to a federal program," then "it cannot issue an uncompensated mandate that petitioner dedicate a portion of its water to a public purpose." Pet. 19 (citing *Horne* v. *Department of Agric.*, 576 U.S. 351, 361-362 (2015) (*Horne II*)). But while the affected raisin growers in *Horne II* owned the raisins, petitioner does not own water in the Santa Clara River; rather, it holds a "right to the use of [the] water." Cal. Water Code § 102; see p. 10, *supra*. And while in *Horne II* "[a]ctual raisins [were] transferred from the growers *to*

the Government," 576 U.S. at 361 (emphasis added), any limitation on the quantity of water that petitioner may divert does not result in a transfer of water to any federal entity. The 2016 letter therefore did not cause the physical appropriation of any property that petitioner owned.

Petitioner characterizes (Pet. 21) the decision below as holding that "even though the government requisitioned nearly 50,000 acre-feet of water from 2017 to 2021," "no physical taking occurred because petitioner still got some fraction of the water that it was entitled to divert." But contrary to that characterization, the court of appeals did not hold that the government may "physically appropriate relatively small amounts of private property for its own use without paying just compensation." *Keystone*, 480 U.S. at 499 n.27. Rather, the court held that the government had not physically appropriated (or requisitioned) petitioner's property at all. The court thus described the RPAs as "represent[ing] a nonpossessory government activity merely requiring that more Santa Clara River water * * * remain[] in the river." Pet. App. 12a.

2. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals or a state court of last resort. Petitioner asserts (Pet. 32) that this Court's review is warranted because the Federal Circuit's exclusive jurisdiction over appeals from the CFC in cases arising under the Tucker Act will "stymie[] the development of a square circuit conflict." But the Tucker Act is not the only way for parties to assert takings claims against the United States. Other statutes displace Tucker Act jurisdiction over certain takings claims. See, *e.g.*, *Horne* v. *Department of Agric.*, 569 U.S. 513, 516 (2013) (*Horne I*) (holding that another statute provided a "comprehensive remedial scheme" that

withdrew "Tucker Act jurisdiction over takings claims brought by raisin handlers").

State courts also hear claims under the Just Compensation Clause, as incorporated against the States by the Fourteenth Amendment, including claims involving water rights. See, *e.g.*, *Kobobel* v. *Colorado Dep't of Natural Res.*, 249 P.3d 1127, 1134 (Colo.) (rejecting takings claim based on limitations on decreed water rights), cert. denied, 565 U.S. 882 (2011); *Bingham* v. *Roosevelt City Corp.*, 235 P.3d 730, 739-741 (Utah 2010) (rejecting takings claim based on diminution of water in soil); *State Dep't of Ecology* v. *Grimes*, 852 P.2d 1044, 1054-1055 (Wash. 1993) (rejecting takings claim based on diminishment of prior appropriation). The California Court of Appeal, for instance, has held that the "imposition of a permit condition limiting the total quantity of groundwater available" for "use" did "not effect a per se physical taking under any reasonable analysis." *Allegretti & Co.* v. *County of Imperial*, 42 Cal. Rptr. 3d 122, 130-131 (2006), cert. denied, 549 U.S. 1113 (2007). Whether the type of water-use regulation alleged here should be analyzed as a physical taking is therefore a question that may arise outside the Federal Circuit. And there is no pressing need for this Court to decide that question now, in the absence of a split of authority.

3. In any event, this case would be a poor vehicle for the Court's review. Petitioner's framing of the question presented (Pet. i) assumes that NMFS's 2016 letter compelled the "appropriation of water that [petitioner] had a property right to use." But as the government explained below, the 2016 letter did not compel anything. See Gov't C.A. Br. 20-26; CFC Doc. 13, at 2-6 (Nov. 14, 2022). Indeed, petitioner acknowledged below that the 2016 letter merely "threatened an enforcement action

against [petitioner] if [petitioner] did not reduce its diversion of water to comply with" RPA 2 in the proposed biological opinion. Pet. C.A. Reply Br. 23. And a mere "threat[]" to bring an enforcement action lacks the legal force necessary to effect a taking, whether physical or regulatory. *Ibid.*; cf. *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127 (1985) (explaining that neither "the mere assertion of regulatory jurisdiction by a governmental body" nor the "requirement that a person obtain a permit before engaging in a certain use of his or her property" is itself a taking).

If anything compelled petitioner to divert less water from the Santa Clara River, it was not the 2016 letter, but the permanent injunction entered by the district court in *Wishtoyo Foundation* v. *United Water Conservation District*, No. 16-cv-3869, 2018 WL 7571315 (C.D. Cal. Dec. 1, 2018). That injunction requires petitioner to implement RPA 2 until it obtains incidental-take authorization from NMFS. See pp. 6-7, *supra*. The federal government is not a party to the *Wishtoyo* litigation; it has not brought its own enforcement suit against petitioner; and it has not issued petitioner an incidental-take permit under Section 10 of the ESA. Because petitioner's Fifth Amendment claim depends on the erroneous premise that NMFS compelled petitioner to reduce its diversion of water, this case would be a poor vehicle for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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