No. 25-523

IN THE

Supreme Court of the United States

UNITED WATER CONSERVATION DISTRICT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF FOR PETITIONER

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Amici have come out in force because the Federal Circuit's decision sets a dangerous national precedent. That decision relegates physical appropriations of water rights to the murk of regulatory-takings balancing. The United States does not defend the court of appeals' reasoning yet embraces its result. But its arguments go even further and amplify the need for review.

The government tries to rebrand its command to send billions of gallons of water to its own preferred destination as mere "water-use regulatio[n]." Br. in Opp. 14. That bureaucrat-speak should fool no one: Petitioner is legally entitled to a fixed quantum of river water; the government ordered it to forfeit a massive amount. That is a textbook physical taking.

That the government's appropriation of petitioner's water necessarily stopped petitioner from using it cannot transform its action into a mere use restriction. This Court rejected the same semantic shell game in *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139 (2021), where it rebuked an effort to trivialize the Takings Clause by deeming the "appropriation" of the central stick in the property-rights bundle "'a mere restriction on its use.'" *Id.* at 154 (citation omitted). The government's position would go further still, confining heartland physical takings to *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), whenever expropriation inhibits use.

The government also overshoots the Federal Circuit in addressing this Court's water-rights cases. Abandoning the arbitrary distinctions the court of appeals deployed to circumvent those decisions, the government now announces its revelation that each case concerned *regulatory* takings all along. None bears that relabeling, and the government's effort to shoehorn them into a regulatory-takings framing again runs into *Cedar Point*.

The government offers nothing to refute the importance of the question presented. It speculates that the issue might someday arise outside the Federal Circuit but gives no reason to await a split. As amici explain, the issue is urgent, has nationwide consequences, and warrants review now.

The government urges the Court to forgo review to await a better vehicle, but it identifies no defects here. Illustrating how far it has strayed, the government argues that it never "compelled" petitioner to forfeit its water but "merely threatened an enforcement action" if petitioner did not comply, on pain of civil penalties and even criminal punishment. Br. in

Opp. 16 (internal quotation marks omitted). That remarkable response blinks the reality any property owner would recognize upon receiving such a threat. But it aligns with the government's view that demanding 16 billion gallons of water from petitioner is not a physical taking.

The petition should be granted.

I. THE FEDERAL CIRCUIT'S DECISION IS WRONG

A. The government does not defend the Federal Circuit's rationale that no physical taking of water rights occurs unless the government "*completely* cut[s] off" a property owner's "access to [its] water" or requires it to "*return* any volume of water it had previously diverted." Pet. App. 11a (emphases added). Refusing to absorb the lessons of *Cedar Point*, the government urges an even broader carveout from the physical-takings framework that would shunt any appropriation of water rights to *Penn Central*.

The government's argument amounts to a word game. It (correctly) recognizes that petitioner owns a "right to the *use* of water" from the river—not particular water molecules, which are continuously replaced. Br. in Opp. 2 (quoting Cal. Water Code § 102); see Pet. 24. But the government reasons that, because its conscription of billions of gallons "limited petitioner's right to the use of the River's flows," it imposed *only* a "use restriction" governed by *Penn Central*. Br. in Opp. 11 (brackets, citation, and emphasis omitted).

That account is at war with the English language and this Court's precedent. As the Court explained decades ago and reiterated in *Cedar Point*, "[s]aying that appropriation" of another's property "'does not constitute the taking of a property interest but rather . . . a mere restriction on its use, is to use words

in a manner that deprives them of all their ordinary meaning.'" 594 U.S. at 154 (quoting *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 831 (1987)). Petitioner has a right to divert a fixed quantity of water from the river to its facilities, which it then may use in myriad ways. But the government directed water away from petitioner to the government's own preferred uses—taking the *central* stick in petitioner's bundle of rights. Atlantic Legal Foundation Br. 24-29.

The government's position also lacks any limiting principle. By its logic, any appropriation could be euphemistically rechristened a use restriction. Any physical taking of property—whether a house, raisins, or water rights—necessarily deprives the owner of its use. *E.g.*, *Horne* v. *Department of Agriculture*, 576 U.S. 351, 361-362 (2015). But that consequence cannot "transform" a confiscation "from a physical taking into a use restriction." *Cedar Point*, 594 U.S. at 154. The regulatory-takings doctrine comes into play only when "the government, *rather than appropriating property for itself or a third party*, instead imposes regulations that restrict an owner's ability to use his own property." *Id.* at 148 (emphasis added). The government would perversely extend *Penn Central*'s balancing test to all physical takings, which inevitably impair use.

B. The government similarly does not stand by the Federal Circuit's arbitrary distinctions of this Court's key water-rights cases, which confirm that reallocating water to the government's use is a *per se* taking. Pet. App. 11a-13a. Three times the Court has held that government actions reallocating water to its own use were physical appropriations of another's water rights. *International Paper Co.* v. *United States*, 282 U.S. 399, 407-408 (1931); *United States* v. *Gerlach*

Live Stock Co., 339 U.S. 725, 753 (1950); *Dugan* v. *Rank*, 372 U.S. 609, 625 (1963). The government does not endorse the court of appeals' attempt to gerrymander a general rule for physical takings of water rights confined to those cases' particular facts. Cf. Pet. 20-27. Instead, once again, the government goes further (Br. in Opp. 12-14), arguing that *International Paper*, *Gerlach*, and *Dugan* all concerned *regulatory* takings. That the government is forced to reframe the whole trilogy is further evidence that its position is fundamentally unsound.

International Paper resists a regulatory-takings rewrite. There, as here, the "petitioner's right was to the use of the water," and the government "t[ook] the use" by directing the water "elsewhere" for purposes it "deemed more useful." 282 U.S. at 407-408. That diversion established that "the Government took the property that the petitioner owned." *Id.* at 408. To its credit, the Federal Circuit correctly recognized that *International Paper* involved a "direct physical appropriation." Pet. App. 10a.

This Court has understood *International Paper* the same way. Before the ink dried on the opinion, the Court cited it as an example of "the property of citizens" being "summarily *seized* in war-time." *Phillips* v. *Commissioner*, 283 U.S. 589, 597 (1931) (emphasis added). And it later reiterated that the government had "exercised its power of eminent domain" and was "bound to make compensation" to the person "who lost the use of the water to which he was entitled." *Ashwander* v. *TVA*, 297 U.S. 288, 335 (1936) (citing *International Paper*, 282 U.S. at 407-408).

Gerlach, too, cannot fairly be recast as a regulatory taking. The government built a dam that deprived landowners of water they had a right to use. In holding

that they were entitled to compensation, the Court put takings of water rights on the same footing as "other takings where private rights are surrendered in the public interest." 339 U.S. at 752. Wherever "[p]ublic interest requires appropriation," the Court stressed, "it does not require expropriation." *Id.* at 753.

The government's revisionist reading of *Dugan* as a regulatory-takings case is equally untenable. The Court itself has classified *Dugan* among other "physical takings by governmental bodies." *United States* v. *Clarke*, 445 U.S. 253, 256 (1980). Indeed, *Dugan* drives a stake through the government's contention that appropriating a right to use water is a mere use restriction. *Dugan* observed that the water rights at issue were "'usufructuary'" (meaning a right to the use of the water) but nevertheless analogized that "seizure of water rights" to a "partial taking of air space over land"—a textbook physical taking. 372 U.S. at 625 (citation omitted); see Pet. 26. Although the government tries to dismiss that discussion in *Dugan* as dictum, this Court's determination that the plaintiffs had alleged a "partial taking" of their water rights formed the basis for the conclusion that they had to seek just compensation instead of an injunction against the responsible officers. 372 U.S. at 620; see *id.* at 623-626.

Cedar Point reaffirmed that governments must accept decisions from before *Penn Central* on their physical-takings terms. 594 U.S. at 158. The United States did not get the message.

C. Unable to square the decision below with directly pertinent precedents, the government looks elsewhere to mining-restriction cases. Br. in Opp. 11-12 (citing *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958); *Keystone Bituminous Coal*

Ass'n v. *DeBenedictis*, 480 U.S. 470 (1987)). Neither case authorized the Federal Circuit's departure from fundamental physical-takings principles or *International Paper*, *Gerlach*, and *Dugan*. And even if tension existed in the Court's decisions, only this Court could resolve it—all the more reason to grant review.

In *Central Eureka*, the government ordered the shutdown of gold mines to prioritize resources for mining different metals that were critical to national defense during World War II. 357 U.S. at 157-160. Two plaintiffs claimed that the government had taken their "rights to operate their respective gold mines." *Id.* at 156. This Court considered that order a mere regulation of the right to use the gold mines 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. And, critically, the government had no "need for the gold," which remained in the ground for the plaintiffs to mine later. *Id.* at 166. Here, by contrast, the government *did* need petitioner's water—that is the whole point. And it took that water by directing petitioner to forfeit it by forgoing diversion of nearly 50,000 acre-feet, so that the water would instead reach the government's favored destination.

The divided decision in *Keystone* is of a piece. Pennsylvania required mining companies to leave half the coal in place under certain buildings to prevent subsidence. 480 U.S. at 476-477. This Court applied the balancing framework of *Penn Central* because "no coal ha[d] been physically appropriated" for the State's own use. *Id.* at 499 n.27. It expressly disavowed any "suggest[ion] that the State may physically appropriate relatively small amounts of private property for its own use without paying just compensation." *Ibid.*; see

id. at 493-502. Even then, four Justices dissented from the Court's conclusion that no taking occurred. *Id.* at 515-518 (Rehnquist, C.J., joined by Powell, O'Connor, and Scalia, JJ., dissenting). Whatever one thinks of *Keystone*, it casts no doubt on this Court's decisions analyzing the government's reallocation of water to its own use as a physical taking.

II. THE FEDERAL CIRCUIT SHOULD NOT HAVE THE LAST WORD ON WATER-RIGHTS TAKINGS

The government makes no effort to refute the real-world significance of the question presented. It does not deny that the proper framework for water-rights takings is important and recurring, or that it will take full advantage of the decision below. And it has no answer to the nationwide array of amici who explain that the decision below makes vital water rights uniquely vulnerable to expropriation. *E.g.*, Western Growers Br. 14-16; Texas Farm Bureau Br. 8-12.

The government stresses (Br. in Opp. 15) the lack of a circuit conflict. But given the Court of Federal Claims' near-exclusive jurisdiction over takings claims against the United States and the nationwide applicability of the Federal Circuit's precedential decision, there is no reason to await a split. The government identifies no benefit from further percolation. All it can say is that the question presented conceivably "may arise outside the Federal Circuit." *Id.* at 16. That hypothetical prospect is hardly a reason to leave the court of appeals' harmful decision unexamined and property owners like petitioner without recourse.

The Court should not hold its breath for a split either. As for federal courts, the government gestures at a lone statute about raisins and other agricultural products. Br. in Opp. 15-16 (citing *Horne* v. *Department of*

Agriculture, 569 U.S. 513, 516 (2013)). But the Federal Circuit's takings docket overflows with water-rights cases precisely because no such specialized statute exists in this context. Pet. 28-29.

The government's suggestion (Br. in Opp. 16) that this Court await a case from state court is less sensible still. Because States grant water rights, takings cases routinely hit a dead end long before the state court confronts the question whether an alleged taking was physical or regulatory—for example, because preexisting state-law limitations deprived the plaintiff of any property right to begin with. *Kobobel* v. *Colorado Department of Natural Resources*, 249 P.3d 1127, 1137-1138 (Colo. 2011); *Bingham* v. *Roosevelt City Corp.*, 235 P.3d 730, 744 (Utah 2010); *Washington Department of Ecology* v. *Grimes*, 852 P.2d 1044, 1055 (Wash. 1993).

The wait for a suitable state-court vehicle could be long indeed. It is no accident that the Court's seminal water-rights takings decisions (*International Paper*, *Gerlach*, and *Dugan*) arose from actions by the federal government.

III. THE GOVERNMENT'S VEHICLE OBJECTIONS FAIL

The government is left to argue (Br. in Opp. 16-17) that the case is an unsuitable vehicle, but it identifies no genuine obstacle to review. The question presented was thoroughly pressed and passed upon below and was the sole basis of the Federal Circuit's decision. The government does not dispute that it is outcome determinative: If the Federal Circuit should have analyzed the appropriation as a physical taking, then petitioner has plausibly alleged a taking. Pet. 19-20.

Ignoring the pleading-stage posture, the government argues that *no* taking occurred because (it says)

the National Marine Fisheries Service's 2016 letter to petitioner demanding the water "did not compel anything" at all. Br. in Opp. 16. But its preferred characterization of events is off-limits at the pleading stage. The government itself purports to "assum[e] the truth of the allegations in the complaint," *id.* at 2 n.*, only to cast that constraint aside. The Federal Circuit properly focused on the pleadings and credited petitioner's allegation that the letter's demand "compelled [it] to increase the amount of water" for the Service's use, thus decreasing the amount left for itself. Pet. App. 11a (quoting C.A. App. 20). The court thus proceeded to address the right question—whether that alleged demand is a physical taking—but simply gave the wrong answer. *Id.* at 9a-13a.

Even on its own terms, the government's portrayal of its demands as mere "[r]ecommendation[s]" is disquieting double-speak. Br. in Opp. 6 (citation omitted). The government says that the Service's 2016 missive was not a mandate because it "merely *threatened an enforcement action* against petitioner if petitioner did not reduce its diversion of water to comply with" the government's directions. *Id.* at 16-17 (emphasis added; brackets and citation omitted). The Service accused petitioner of violating the Endangered Species Act and ordered that the demanded measures—*i.e.*, sending more water downstream to facilitate steelhead migration—"*must be in place before December 1, 2016*." C.A. App. 55. It further threatened to "pursue legal options" under the Act if petitioner did not "timely implement" those measures. *Ibid.* Those "legal options" included civil enforcement with a $25,000 penalty per violation—and even criminal prosecution, with the potential for a year of imprisonment and a heftier fine. See 16 U.S.C. § 1540(a)-(b).

No one would label a letter from a federal agency threatening civil penalties and hard time in federal prison a polite request. Cf. Br. in Opp. 17. The government would put property owners in an untenable position. On its view, petitioner's only choices were to (A) refuse to comply, provoke civil or criminal enforcement, and have its officers risk a stint in a federal penitentiary, or (B) surrender its property and submit to a permitting process that remains ongoing long after the six-year statute of limitations would have run on the physical taking. Pet. 30; see 28 U.S.C. § 2501.

That is no choice at all. It would "relegat[e] the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights." *Knick* v. *Township of Scott*, 588 U.S. 180, 189 (2019) (citation omitted). The default rule—which the government sometimes forgets, *e.g.*, *Army Corps of Engineers* v. *Hawkes Co.*, 578 U.S. 590, 600-601 (2016)—is that plaintiffs need not "bet the farm" by disobeying a government order and incurring potentially ruinous penalties. *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 490 (2010) (citation omitted). Yet the government's position would force them to do just that.

The government's parting contention (Br. in Opp. 17) that the Takings Clause never came into play because petitioner complied with the Service's demand after entry of an injunction is even less coherent. The district court in *Wishtoyo Foundation* v. *United Water Conservation District*, 2018 WL 7571315 (C.D. Cal. Dec. 1, 2018), had held that the Endangered Species Act required petitioner to "continue to adhere to the water diversion operating rules" formulated by the Service. *Id.* at *1. That decision demolishes the government's argument that petitioner forfeited its water

freely. Petitioner did so as required by federal law, implemented by an agency letter *and* a court order. The government stresses (Br. in Opp. 17) that it was "not a party" in *Wishtoyo*, but that is of no moment: The just-compensation mandate does not "var[y] according to the branch of government effecting the expropriation." *Sheetz* v. *El Dorado County*, 601 U.S. 267, 276 (2024) (citation omitted). Whether the most immediate cause was the Act, the Service's demands, or the injunction, the United States took petitioner's property. That taking demands just compensation.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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