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 THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the government's appropriation of water that a person had a property right to use is analyzed as a physical taking, rather than a regulatory taking, under the Fifth Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files amicus briefs.

Cato Institute scholars have published extensive research on constitutional law. This case interests the Cato Institute because it is about the right to use and control property—one of the most vital rights in any free society and one of the most basic rights protected by the Constitution.

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[1] Rule 37 statement: All parties were timely notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

The Federal Circuit held that when the government changes the flow of water to prevent the possessor of water rights from fully exercising those rights, the government does not effect a physical taking. The Federal Circuit instead categorized such diversion as a mere *regulatory* taking. That decision misapplies this Court's precedents, weakens property rights, and calls for this Court's review.

The United Water Conservation District ("United") manages the water between the Santa Clara River and the Oxnard Coastal Plain. Pet. App. 2a. United possesses an undisputed property right to divert and use up to 144,630 acre-feet of water annually. Pet. 3. United's powers of diversion are limited by the amount of water available in the river, which is less than the amount United is entitled to divert. *Id.* at 8. Water that is not diverted is called the bypass flow: it consists of water that remains in the river or goes through a fish ladder. Pet. App. 4a.

In 1997, the Santa Clara River's steelhead trout was designated as an endangered species. In 2016, the National Marine Fishery Service ordered United to increase the river's bypass flow significantly, which allowed more steelhead trout to travel downstream. That increase in the bypass flow limited United's ability both to divert water and to exercise its property right in the water to its full extent. Pet. 10. United sued the United States in the Court of Federal Claims.

Under the Fifth Amendment, the taking of a property right by the government requires compensation. That is true no matter how small the taking is; that is true no matter which type of property right is taken.

One type of property rights is water rights. Yet the Federal Circuit opinion asserts that a water-rights holder's takings claim must go through the cumbersome "regulatory taking" pathway unless the government has either taken every drop of the water at issue or the government has commanded the rights-holder to relinquish water that was already within its possession. In this case, the lower court found that, because the water still follows its natural course even after the taking occurred, there was therefore no physical taking.

The lower court's theory cannot be reconciled with extensive precedent from this Court that explains when a physical appropriation of water rights constitutes a taking. *See Int'l Paper Co. v. United States,* 282 U.S. 399 (1931); *United States v. Gerlach Live Stock Co.,* 339 U.S. 725 (1950); *Dugan v. Rank,* 372 U.S. 609 (1963). The lower court determined that these opinions are not relevant to the case at hand—essentially because they were supposedly superseded by the case that created the category of "regulatory" takings. *See Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), But this is wrong: *International Paper, Gerlach,* and *Dugan* still govern. Those opinions are good law today, they are relevant here, and they demonstrate that United suffered a physical taking.

ARGUMENT

I. THE SIZE AND LOCATION OF THE DIVERSION OF WATER HAS NO IMPACT ON WHETHER IT IS A PHYSICAL TAKING.

The Federal Circuit concluded that, because the government neither "completely cut off [United's] access to the water" nor "caused it to return any volume

of the water it had previously diverted to its possession," there was no physical taking. Pet. App. 11a. But that conclusion cannot be reconciled with the precedent of this Court. The size of the taking is irrelevant when determining whether a taking occurred; a small taking is nonetheless a taking. In this case, there was a taking because United's preexisting right to use a certain amount of water was taken. Any "physical appropriation of property" is enough to effect a *per se* physical taking. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021).

Three key opinions—*International Paper, Gerlach,* and *Dugan*—all illustrate that principle in the water rights context. In *International Paper*, the United States ordered the Niagara Falls Power Company to divert all possible water into its own electrical generators during World War I. Because the power company carried out that order, the International Paper Company was unable to exercise its own right to divert a much smaller amount of water for its own use, and it therefore suffered a taking. *Int'l Paper Co.,* 282 U.S. at 404–06. There has been no subsequent change in takings doctrine that affects the application of the law to such facts, and therefore the lower court's theory cannot explain why this Court held that the International Paper Company was subject to a physical taking. In *International Paper,* the party that was subject to a taking was not forced to recover the water and return it. Nonetheless, the Court found that the circumstances constituted a physical taking. "The petitioner's right was to the use of the water; . . . it is hard to see what more the Government could do to take the use." *Id.* at 407.

In *Gerlach,* a diversion of the water in the San Joaquin River into a new irrigation system at the Friant Dam prevented downstream farmers from exercising their riparian rights. Traditionally, the uncontrolled and natural swelling of the San Joaquin River irrigated the claimants in *Gerlach*'s land; the dam prevented such irrigation by restricting the flow of water. *Gerlach,* 339 U.S. at 730. The outcome of that case cannot be squared with the theory of the lower court here, because the claimants in *Gerlach* were not returning water that had been physically diverted. The government was—just as in this case—preventing access that the claimants were legally entitled to. Nonetheless, the Court found that "California unintentionally destroyed and confiscated a recognized and adjudicated private property right . . ." *Id.* at 753. Once again, no subsequent change in takings doctrine affects the application of the law to such facts, and therefore the lower court's theory cannot explain why the *Gerlach* claimants were subject to a physical taking.

Finally, in *Dugan,* in the same circumstances as *Gerlach*—namely, the construction of the Friant Dam was interfering with the San Joaquin River—the Court once again found a physical taking. What is true for *International Paper* and *Gerlach* is also true for *Dugan:* Once again, the theory offered by the lower court cannot explain the case's outcome—that is, the physical taking occurred even though there was no return of the water and even though the water that the Dugan plaintiffs had a right to use was not wholly depleted. In *Dugan*, the Court discovered "a partial taking of respondents' claimed rights." *Dugan*, 372 U.S. at 620. The impairment was "substantial—almost three-fourths of the natural flow of the river." *Id.* at 621. Notably, the quantum of "almost three-fourths" falls

short of "completely cut[ting] off . . . access to the water." Pet. App. 11a.

Recent decisions of this Court have emphasized that a taking of only some of the "bundle of sticks" of property rights is still a taking. In *Cedar Point Nursery*, the Court found that a California regulation granting union organizers a right to access a farmer's property constituted a physical taking. The union organizers did not appropriate the farmers' property entirely or permanently; they did not literally possess all the farmers' land. Rather, they partially appropriated the "right to exclude," which made it a "a *per se* physical taking." 594 U.S. at 149.

The right to exclude is also at the core of water rights. In fact, it is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979). In the context of water rights, a senior water rights holder "can take the water to which they are entitled and exclude others by preventing them from using it." Luis Inaraja Vera, *Taking Property and Appropriative Water Rights*, 44 CARDOZO L. REV. 271, 295 (2022). The "essence" of the right to exclude is prevention of use by others. *Id.* Because revoking the right to exclude in *Cedar Point* was a physical taking, revoking the right to exclude in this case must be understood as a physical taking as well.

Indeed, before the Federal Circuit lost its way in this case, it had previously found that even a partial diversion of water was a taking. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008) (*Casitas I*). In *Casitas*, the National Marine Fishery Service ordered the diversion of water through a fish ladder to let endangered steelhead trout pass. *Casitas*

I, 543 F.3d at 1282. The water district sued, alleging a Fifth Amendment taking. When the Federal Circuit decided *Casitas,* it relied upon *International Paper, Gerlach,* and *Dugan*; it found that the petitioner's "right was to the use of the water, and its water was withdrawn . . . and turned elsewhere . . . by the government." *Id.* at 1292. Even though the water right was only partially impaired, not fully impaired, that didn't matter: a partial impairment was a taking. *Id.*

Casitas involved a physical taking because the government compelled water to go through the fish ladder. "This is no different than the government piping the water to a physical location." *Id.* at 1294. Once the government issued a command, water was redirected. After that, less water was available; Casitas, just like United, could no longer fully exercise its property right.

Further litigation, five years later, emphasized that this diminution of property rights constituted a physical taking. Appropriative water rights, regardless of the possession of the actual "corpus" of the river—that is, the physical molecules of water—are recognized as "private property subject to ownership and disposition." *Casitas Mun. Water Dist. v. United States* 708 F.3d 1340, 1354 (Fed. Cir. 2013) (*Casitas II*). "In other words, although a private entity cannot own water itself, the right to use that water is considered private property." *Id.* In that case, whether the Casitas district's use of the water was sufficient to fall under its appropriative rights was disputed; in this case, however, United's property rights are undisputed. Pet. App. 4a. And just as in *Casitas*, "any taking in this case would be physical, not regulatory in nature." *Casitas II*, 708 F.3d at 1359.

Between *Cedar Point* and the trifecta of *International Paper, Gerlach,* and *Dugan*, the Federal Circuit's argument collapses. Even a partial taking is still a taking; water does not have to be entirely cut off for it to be taken. Nor does water have to be returned after it is diverted for it to be taken. *Casitas*—in both its 2008 and 2013 iterations—shows the synthesis of both of those branches of reasoning. As long as a right to use water is impaired, even partially, and the ability to use some portion of the water shifts from one party to another, a physical taking has occurred. That is just what happened in this case. Under *Cedar Point*, and under *International Paper, Gerlach,* and *Dugan*, the United States has physically taken United's water rights.

II. *INTERNATIONAL PAPER, GERLACH,* AND *DUGAN* REMAIN GOOD LAW IN THESE CIRCUMSTANCES.

The Federal Circuit held in effect that *International Paper, Gerlach,* and *Dugan* are no longer relevant because they predate *Penn Central*. That is wrong. Not only have other post-*Penn Central* cases in the Federal Circuit relied upon *International Paper, Gerlach*, and *Dugan,* but the Federal Circuit's theory directly contradicts the logic of *Cedar Point*.

In *Washoe County v. United States*, 319 F.3d 1320 (Fed. Cir. 2003), the Federal Circuit invoked both *International Paper* and *Dugan* as precedent recognizing a physical taking "[i]n the context of water rights" when the government has "decreased the amount of water accessible by the owner of the water rights." *Id.* at 1326. In *Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750 (Fed. Cir. 2013), the Federal Circuit cited *Gerlach* and *Dugan* as authority that "the taking of

water to which the landowners are entitled is clearly a physical invasion that is effective as soon as the water is taken."

More importantly, *International Paper, Gerlach,* and *Dugan* were critical to the determination of *Casitas I*. That opinion illuminated the difference between per se takings and regulatory takings. In *Casitas*, the Federal Circuit determined that the trio of *International Paper, Gerlach,* and *Dugan* "provides guidance on the demarcation between regulatory and physical takings analysis with respect to these [water] rights" and that "the Supreme Court analyzed the government action in each of these cases as a per se taking." *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1289–90 (Fed. Cir. 2008) (*Casitas I*). Indeed, that opinion even noted that a later, post-*Penn Central*, regulatory takings case, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002), did not "overrule, modify, or even mention the holdings of *International Paper, Dugan,* or *Gerlach*. As such, these cases remain good law." *Casitas I,* 543 F.3d at 1296.

Long after *Penn Central*, the Federal Circuit used *International Paper, Gerlach,* and *Dugan* to demonstrate the boundaries between physical and regulatory takings in water rights. Yet now, absent intervention by this Court, the Federal Circuit's reasoning in this case will bind both future Federal Circuit panels and the Court of Federal Claims.

Cedar Point also bluntly explained the irrelevance of *Penn Central* to physical takings. "Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place." *Cedar Point*, 594 U.S. at 149. As *Cedar Point*

explained, in this context the label of "regulatory takings" can be misleading: "Government action that physically appropriates property is no less a physical taking because it arises from a regulation." *Id*. In other words, a taking that arises from a regulation is not, simply for that reason, a regulatory taking.

Rather, a regulation can effect a physical taking. Allowing union organizers to physically enter a farmer's land can constitute a physical taking, as in *Cedar Point*. Allowing the government to take a farmer's raisins can constitute a physical taking, such as in *Horne v. Department of Agriculture,* 576 U.S. 351 (2015). Here, too, when the government orders water to bypass the rights holder's diversion facilities, that constitutes a physical taking.

That *Penn Central* postdates *Dugan, Gerlach,* and *International Paper* is irrelevant. *Dugan, Gerlach,* and *International Paper* were about physical takings. In those cases, the ability to put water to use physically shifted from the original rights holder to the government. One necessary implication of *Cedar Point* is that, even though the governmental appropriation of the right to use the water is achieved via *regulation*, that regulation does not therefore create a *regulatory* taking. *Penn Central* didn't change that; indeed, *Cedar Point* says that *Penn Central* didn't change that. In *Cedar Point,* this Court rightly noted that a similarly inadequate reading of the Takings Clause by a lower court was "insupportable as a matter of precedent and common sense." *Cedar Point*, 594 U.S. at 153; *see also id*. at 153–56. Here, the Federal Circuit has misapplied takings doctrine in much the same way, and this Court should correct the lower court's misunderstanding.

CONCLUSION

United's property rights in this case are uncontested. The sole issue here is whether an appropriation of water rights is a physical or a regulatory taking. This Court held that the governmental appropriation of the use of water is a physical taking in *International Paper, Gerlach,* and *Dugan,* and that the taking of the right to exclude is a physical taking in *Cedar Point*. The right to exclude use by others is just as key to water rights as it is to land rights.

The Federal Circuit erroneously claimed that *International Paper, Gerlach,* and *Dugan,* because they are pre-*Penn Central* cases, are no longer relevant. That claim overlooks the Federal Circuit's own reliance on *International Paper, Gerlach,* and *Dugan* as precedent after *Penn Central*. Furthermore, the Federal Circuit has misunderstood this Court's *Cedar Point* framework for physical takings. Now that the Federal Circuit has gone astray, it is up to this Court to correct its course.

We ask the Court to grant the petition for certiorari for these reasons, and for those described by the United Water Conservation District in its petition.

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