No. 19-1134

IN THE

Supreme Court of the United States

LONNY E. BALEY, ET AL.,

Petitioners,

v.

UNITED STATES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF CALIFORNIA WATER AGENCIES IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF CALIFORNIA WATER AGENCIES IN SUPPORT OF PETITIONERS

The Association of California Water Agencies ("ACWA") respectfully submits this brief as *amicus curiae* in support of Petitioners Lonny Baley and John Anderson Farms, Inc. *et al*.[1]

INTEREST OF *AMICUS CURIAE*

ACWA is a non-profit public benefit corporation that is organized and has existed under California law for more than a century. It is the largest statewide coalition of public water agencies in the United States. Its members – more than 430 water providers – include cities, municipal water districts, irrigation districts, water districts, water storage districts, and county water districts across California. These agencies develop and operate water supply projects of all magnitudes, and manage, treat, and distribute water for agricultural, domestic, industrial and fish and wildlife uses. Collectively, these agencies, many of whom rely on water storage facilities, are responsible for approximately ninety percent of the water delivered to farms, people, businesses and wildlife refuges in California.

ACWA has a vital interest in the question of whether a federal court may – under the guise of ensuring compliance with the federal Endangered Species Act

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* ACWA to file this brief. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than *amicus* ACWA, its members or its counsel made a monetary contribution to its preparation or submission.

(the "ESA") – subvert the administration of a state or local agency's water resources. Specifically, given California's heavy dependence on the storage of water for later use or for use in other portions of the state, ACWA has a vital interest in whether a federal court may reallocate such stored water to the detriment of its member agencies.

Pursuant to this Court's Rule 37.2(a), counsel of record in this case received timely notice of ACWA's intent to file this brief, and all parties consented to the filing of this brief with the Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The California economy, which represents about 15% of the nation's gross domestic product, fundamentally depends on the storage of water in man-made reservoirs and the certainty that such stored water will be available when needed. During California's wet winters, precipitation and snowmelt collect in reservoirs throughout the state. Reservoir operators, including the United States and the State of California, then convey previously stored water through rivers and canals to farms and cities during the dry period in the spring, summer and fall. People in the San Francisco Bay Area and farms in the Central Valley rely on water captured in storage reservoirs in the Sierra Nevada Mountains. Similarly, Southern California relies on water captured in storage reservoirs in Northern California, along the Colorado River and in the Eastern Sierra Nevada Mountains for its water supplies. Many communities throughout California, including rural and disadvantaged communities, rely on local reservoirs as their only source of surface water supplies. In addition to supplying drinking water to over 32 million Californians, water

stored in California reservoirs is the lifeblood of the farms that provide about 40% of the nation's fresh fruits and vegetables. All of these activities are founded on California's water law, which serves as the rulebook for priority and use of water in this complex system, and which explicitly protects stored water.

The Federal Circuit's decision violates core principles of Western water law, including California law, by reordering the priority of rights to previously stored water. Water law in the western states is founded on principles governing the right of a party to use water naturally occurring in streams, rivers and aquifers. Water that has been previously stored is *not* naturally available from a stream. Rather, under California law as an example, the party storing water in a reservoir accrues a vested right to that stored water, reflecting the importance of that investment to the party storing the water and, ultimately, to the state. Much as rights to real property vest under state law and cannot be interfered with by the United States, rights to stored water are properly the province of state law and not subject to unilateral reallocation by the United States.

Instead of recognizing the vested right to stored water as required under California law and Western water law, however, the Federal Circuit substituted tribal reserved water rights for the asserted needs of threatened and endangered species listed under Federal regulation. This substitution of an asserted reserved water right for environmental regulation allowed the Federal Circuit to sidestep the question of whether that environmental regulation amounts to an unconstitutional taking of a vested right and so effectively eliminated water users' protection under applicable law.

The Federal Circuit's decision in this action, if allowed to stand by this Court and applied in California, would undermine more than 150 years of California water law and California's extensive water storage and delivery system to the detriment of both California and the nation. The reallocation of previously stored water without consideration of state vested water rights negates the substantial investments that have been made – and continue to be made – by ACWA member agencies to provide secure water supplies for human consumption, for irrigating crops and for environmental purposes. More importantly, it discourages investment in future water storage projects that are necessary to continue to provide reliable water supply in the face of climate change. It represents an incursion by the United States in an arena reserved to the States, in a manner inconsistent with California water law. Such a reallocation of scarce water supplies has the potential to cause critical water shortages in all but the wettest of years. Such shortages could disrupt the California economy and, therefore, disrupt the nation's economy. Moreover, by disrupting agricultural production in California's Central Valley, such shortages are likely to cause food insecurity. The potential of the Federal Circuit's decision to indirectly disrupt one of the nation's most important sources of food deserves this Court's attention.

For these reasons, the Court should grant the petition for certiorari.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION UNDERMINES THE SECURITY OF STORED WATER IN CALIFORNIA.

A. California's Need for Stored Water.

Ensuring a reliable water supply for a state as vast, geographically and climatically diverse, and populated as California presents innumerable challenges, as ACWA's members can attest. In essence: "[t]he history of California water development and distribution is a story of supply and demand."[2] The California Supreme Court succinctly stated that: "California's critical water problem is not a lack of water but uneven distribution of water resources."[3]

> "[W]hile over 70 percent of the [state's] stream flow lies north of Sacramento, nearly 80 percent of the demand for water supplies originates in the southern regions of the state. And because of the semi-arid climate, rainfall is at a seasonal low during the summer and fall when the demand for water is greatest; conversely, rainfall and runoff from the northern snowpacks occur in late

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[2] *United States v. State Water Res. Control Bd.*, 182 Cal.App.3d 82, 98 (1986).

[3] *In re Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings*, 43 Cal.4th 1143, 1152 (2008); *see also El Dorado Irrigation Dist. v. State Water Res. Control Bd.*, 142 Cal.App.4th 937, 945 (2006) (describing California's "most fundamental water problem" as a "'maldistribution of moisture in relation to human needs'").

> winter and early spring when user demand is lower."[4]

In particular, the distribution and use of water in and from the Sacramento-San Joaquin River/San Francisco Bay-Delta watershed is critical to California's economy and society: "Two-thirds of California households receive at least some of their domestic water from the Bay–Delta, and over seven million acres of highly productive land are irrigated from the same source."[5] Similarly, stored water is an essential, and often the only, source of surface water for small agricultural areas and municipalities throughout California.

B. California Law Protects Stored Water as a Foundation of California's Economy.

California has long recognized that riparian and appropriative water rights extend to natural or abandoned flows in a watercourse but those rights do not include water previously stored by another party.[6] Almost a century ago, the California people revised the California Constitution to emphasize the importance of protecting stored water, a policy that continues to the present day.

Prior to the constitutional amendment, in 1926, the California Supreme Court in *Herminghaus v. Southern*

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[4] *United States v. State Water Res. Control Bd.*, 182 Cal.App.3d at 98.

[5] *In re Bay–Delta*, 43 Cal.4th at 1153; see also Cal. Water Code § 85004 (legislative finding that a reliable water supply for the state involves water storage).

[6] *Lindblom v. Round Val. Water Co.*, 178 Cal. 450, 457 (1918); *see El Dorado Irrigation Dist. v. State Water Res. Control Bd.*, 142 Cal.App.4th at 962.

California Edison Company upheld the right of a riparian landowner to block the storage of water for a hydroelectric facility.[7] The Court found that under the common law riparian doctrine, a landowner had a right to require the entire flow of a stream to flow past riparian lands so as to allow a small portion to be used for irrigation, despite the inherent inefficiencies of that demand.[8]

In a swift rebuke of the *Herminghaus* ruling, in 1928 the people of California amended the California Constitution to state, in relevant part: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable."[9] The California Supreme Court then quickly reversed its decision in *Herminghaus*, finding that the development of water storage projects, for municipal supplies, irrigation and hydropower, were necessary for the state's well-being.

In an extraordinary line of decisions issued between 1933 and 1939, the California Supreme Court interpreted the 1928 constitutional amendment, explicitly holding that the constitutional amendment was intended to and did support increased water storage to meet the state's needs, thereby rejecting its decision in *Herminghaus*.[10] In each of these decisions, the

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[7] *Herminghaus v. S. Cal. Edison Co.*, 200 Cal. 81, 122-23 (1926).

[8] *Id.* at 103-05.

[9] Cal. Const. art. X, §2.

[10] *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 703-04 (1933); *Peabody v. City of Vallejo*, 2 Cal.2d 351, 373 (1935); *City of Lodi v. East Bay Mun. Util. Dist.*, 7 Cal.2d 316, 333-34 (1936);

California Supreme Court considered the claims of downstream water users that the construction and operation of upstream storage reservoirs interfered with their enjoyment of the various benefits of high streamflows.[11] And in each instance the California Supreme Court found that the 1928 constitutional amendment supported water storage over riparian or other non-storage water uses.[12]

The *Meridian Ltd., v. City and County of San Francisco* decision, in particular, shows that the 1928 constitutional amendment recognized the importance of water storage for California's economic development. That Court held that the "restraint and storage of water in the upper reaches of our rivers and streams as a means of protection against damage by flood and of equalizing and stabilizing the flow *are* beneficial uses" and that "[i]t was undoubtedly the purpose of the proponents of the amendment of 1928 to make it possible to marshal the water resources of the state and make them available for the constantly increasing needs of all of its people."[13]

Since these decisions, the California courts have continued to emphasize the importance of water storage in reservoirs for the development of the California economy. For instance, in 1967 the California Supreme

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Meridian, Ltd., v. City and County of San Francisco, 13 Cal.2d 424, 458-59 (1939).

[11] *Gin S. Chow*, 217 Cal. at 677-680; *Peabody*, 2 Cal.2d at 358-60, 369-70, 375-76; *City of Lodi*, 7 Cal.2d at 320-23; *Meridian*, 13 Cal.2d at 429-30, 435-38.

[12] *Gin S. Chow*, 217 Cal. at 699-706; *Peabody*, 2 Cal.2d at 358-60, 369-70, 375-76; *City of Lodi*, 7 Cal.2d at 337-40, 343-45; *Meridian,* 13 Cal.2d at 444-51.

[13] *Meridian*, 13 Cal.2d at 451 (emphasis added).

Court reiterated that the 1928 constitutional amendment was intended to meet the paramount need for water storage in California and described the need for the conservation (i.e., the development of new supplies including storage) of water in California as a matter of transcendent statewide importance.[14] Thus, it is clear that the development and protection of stored water is a fundamental principle of California water law, upon which ACWA members have made tremendous investments over the decades.

C. The Federal Circuit's Decision is Inconsistent With the Prior Appropriation System and Thereby Undermines the Security of Stored Water in California.

This Court has noted, in an opinion by Justice Rehnquist, that "[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress."[15] In carrying out this directive, this Court has applied California water law to the United States' operation of the West's largest water storage and delivery project, the Central Valley Project ("CVP").[16] In California, this deference by the federal courts to state law largely means

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[14] *Joslin v. Marin Mun. Water Dist*., 67 Cal.2d 132, 140 (1967).

[15] *California v. United States,* 438 U.S. 645, 653 (1978).

[16] *See, e.g., United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 743, 754 (1950) (relying on precedent to find "sound basis in California law" on an issue not specifically answered by the California Supreme Court, and observing that the Court must "venture a conclusion as to peculiarly local law" because "federal law adopts that of the State").

deference to the doctrine of prior appropriation and the legal protections afforded to stored water under California law.

Prior appropriation is a water rights system embraced in each of the arid western United States. Under this system, "[i]n periods of shortage, priority among confirmed rights is determined according to the date of initial diversion,"[17] and the senior appropriator is entitled to its entire allotment of water before more junior rights holders receive theirs. In short, the doctrine provides that "as between appropriators[,] the first one in time is the first in right."[18] Water impounded in a storage reservoir has been appropriated and reduced to possession by the appropriator, and the State's authority to direct the release of such water is limited.[19]

The Federal Circuit's decision, however, overrides these state law limitations rather than deferring to them, as described in the petition for certiorari, and ignores the policy and equitable bases for these protections. For example, nowhere in the Federal Circuit's decision are rights to previously stored water addressed. Rather, the Federal Circuit substitutes the body of federal environmental law under the ESA, implicitly giving those requirements a blanket priority as alleged reserved rights, for the prior appropriation doctrine and specifically its protection of stored water. In this way, the Federal Circuit's decision ignores the applicable body of state law governing water rights

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[17] *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 805 (1976).

[18] *Wishon v. Globe Light & Power Co.*, 158 Cal. 137, 140 (1910).

[19] *See, e.g.*, *Copeland v. Fairview Land & Water Co.*, 165 Cal. 148, 153-154 (1913); Cal. Code Regs. tit. 23, § 784(b).

and use. Reallocating stored water without regard for state law flies in the face not only of the prior appropriation doctrine, but also in the face of federal deference as described by this Court in *California v. United States*. At a minimum, the Federal Circuit must be directed to provide a thorough discussion and justification for the reallocation of water as a replacement of federal environmental regulation under the ESA, including a discussion of how stored water that was not present in a state of nature can be substituted for natural flows to which the species was adapted.

II. THE REALLOCATION OF STORED WATER WOULD DISRUPT CALIFORNIA'S WATER DELIVERY SYSTEM.

A. Water Delivery Systems in California.

Most of California is served by one or more water storage and delivery systems, where water is stored in a reservoir and then delivered for urban, agricultural and environmental uses. The State has recognized additional surface storage is necessary to ensure water reliability as it faces the challenges presented by a warming climate and a change in precipitation.[20]

There are several storage systems in Northern California that provide for municipal and farming supplies at a regional level. There are also several storage and delivery systems that move water several hundred miles. For example, the City of Los Angeles has an aqueduct to move water from the Eastern Sierra Nevada Mountains to Los Angeles. The City and County of San Francisco and other public agencies in the San Francisco Bay Area have storage reservoirs in the Sierra Nevada Mountains, from which they

[20] *See e.g.,* Cal. Water Code § 85004.

transport water to serve the needs of the San Francisco Bay Area. The Solano Project, a local reservoir in Solano County, California, was designed to irrigate approximately 96,000 acres of land and furnish municipal and industrial water to the cities of Vallejo, Vacaville and Fairfield. The New Hogan Project, a small reservoir in San Joaquin County, was designed to irrigate approximately 100,000 acres of land and to furnish municipal and industrial water to the City of Stockton. Similar locally owned reservoirs in Stanislaus and Tuolumne Counties provide irrigation water to hundreds of thousands of acres of agricultural land, and provide the sole source of surface water supplies to the cities of Modesto, Turlock, Merced, and others.

The largest of these water storage and supply projects are the federal CVP operated by the United States Bureau of Reclamation, and the California State Water Project ("SWP") operated by the California Department of Water Resources. The California Supreme Court described the CVP, saying: "[t]he CVP operates 21 reservoirs, 11 power plants, and 500 miles of major canals and aqueducts. With total storage capacity of more than 12 million acre-feet, the CVP delivers approximately seven million acre-feet of water annually through the Delta–Mendota Canal to over 250 water contractors, primarily for agricultural use in the Central Valley and adjacent areas."[21] In fact, this Court has long recognized the importance of the CVP to California. "The grand design of the [CVP] was to conserve and put to maximum beneficial use the

[21] *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 43 Cal.4th at 1154 n.1.

waters of the Central Valley of California, comprising a third of the State's territory."[22]

The California Supreme Court similarly described the SWP: "[t]he SWP consists of a series of 21 dams and reservoirs (including Oroville Dam and Lake Oroville on the Feather River, a tributary of the Sacramento River), five power plants, 16 pumping plants, and 662 miles of aqueduct; it exports Bay–Delta water through the California Aqueduct."[23] The SWP principally delivers water to Southern California and the southern San Joaquin Valley, with some deliveries to the Bay Area and Northern California.

B. Reallocating Stored Water Would Cause Shortages in All But the Wettest of Years.

As can clearly be seen from the foregoing discussion, water delivery systems in California generally follow the "just in time" delivery model common to many supply chains today. Inventory (in this case winter precipitation and snowmelt) is stored in warehouses (i.e., storage reservoirs in mountainous areas) and then transported (via rivers, canals, pipelines, and pumping plants) for delivery "just in time" to meet demands during the dry season. This water delivery system is highly efficient, but is also easily subject to disruption. For instance, precipitation in Northern California (the source of most of the state's water supply) during a normal water year is about 51 inches while precipitation during a critically dry drought year like 2014-15 is about 37 inches (or a difference of

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[22] *Dugan v. Rank*, 372 U.S. 609, 612–13 (1963).

[23] *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 43 Cal.4th at 1154 n.2.

about 28% between normal and critically dry years).[24] In this way, small changes in water availability – whether manmade or due to hydrologic conditions – can have a large change in the quantity of water available in California. Reallocating previously stored water in the manner of the Federal Circuit's decision would make water unavailable when needed and cause ripple effects throughout the complex water delivery system in California. As the nation witnessed in the reallocation of basic goods such as toilet paper and flour during the coronavirus pandemic of 2020, interruptions in supply and delivery chains can wreak havoc on communities and the lives of Americans. To allow such havoc in the water supply and delivery of the Western States would indeed be disastrous for drinking water, irrigation of crops and fish and wildlife.

III. THE FEDERAL CIRCUIT'S DECISION CREATES UNCERTAINTY.

The Federal Circuit's decision, if not reversed by this Court, has the potential to undermine the certainty required for the administration of water rights in the Western United States. In *In Re Waters of Long Valley Creek Stream System*, the California Supreme Court considered the question of how to handle unused riparian rights that would otherwise be afforded seniority in a comprehensive adjudication of a stream system. The Court there noted that the uncertainty relating to those unused rights had a number of adverse impacts on the administration and use of water rights. Specifically, the Court found:

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[24] *See Northern Sierra Precipitation 8-Station Index*, Department of Water Resources California Data Exchange Center, https://cdec.water.ca.gov/precipapp/get8SIPrecipIndex.action (last visited April 10, 2020).

> Uncertainty concerning the rights of water users has pernicious effects. Initially, it inhibits long range planning and investment for the development and use of waters in a stream system . . . . Uncertainty also fosters recurrent, costly and piecemeal litigation. In the present case, for example, there has been incessant litigation between the claimants to the waters of the stream system since about 1883 . . . . Finally, uncertainty impairs the state's administration of water rights.[25]

By equating the federal agencies' unquantified interest in water to support ESA-listed species with an unquantified right to support tribal fishing uses and giving both interests priority over valid rights in stored water, the Federal Circuit's decision would introduce into California law exactly the sort of uncertainty the California Supreme Court sought to minimize in *In re Waters of Long Valley Stream System* and California's voters sought to address in amending the State's Constitution in 1928. Such uncertainty, especially in light of the continuing litigation relating to the ESA and the operation of the CVP and SWP,[26] imposes significant burdens on ACWA members and creates the distinct possibility of additional water shortages in California, as discussed above.

This Court has – properly – never found a tribal reserved right to extend to the release of stored water;

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[25] *In Re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339, 354-356 (1979).

[26] *See, e.g., Pac. Coast Fed. of Fishermen's Ass'ns, et al. v. Ross, et al.*, 1:20-cv-07897 (E.D. Cal. 2019); *California Natural Res. Agency, et al. v. Ross, et al.*, 1:20-cv-00426 (E.D. Cal. 2020).

the lack of any right to insist on the release of stored water is consistent with both state water law and logic. That principle alone requires that the Federal Circuit's decision be reversed. From a policy perspective, moreover, without knowing how a water resource will be allocated in times of shortage, ACWA's members and other water users and communities will likely face difficulty in making the needed investments to keep water infrastructure running properly and in providing reliable water supplies to the public.

ACWA's members – many of them senior water-rights holders – are committed to the protection of the environment, species and natural habitats, and their water supply portfolios. These commitments can all be accommodated through a proper application of the ESA and the prior appropriation doctrine to protect water rights, especially rights in stored water. ACWA seeks to have this Court direct the Federal Circuit to fully consider the application of California's Constitution in applying the prior appropriation doctrine in the context of federal reserved rights and requirements under the ESA.

IV. THE FEDERAL CIRCUIT'S DECISION UNDERMINES FOOD SECURITY.

While there are many potential impacts that may occur from ignoring the Western States' water rights law, one important implication is uncertainty for California agriculture. Water, along with agriculture and food, are "essential critical infrastructure" necessary to ensure "continuity of functions critical to public health and safety, as well as economic and national security."[27] California is the nation's leading producer

[27] *See List of Essential Critical Infrastructure Workers,* California Coronavirus (COVID-19) Response (March 22, 2020),

of almonds, avocados, broccoli, carrots, cauliflower, lettuce, milk, spinach and dozens of other commodities, according to a California Department of Food & Agriculture report.[28] California produces one-third of the nation's vegetables and two-thirds of its nuts and fruits each year.[29] Simply put: The United States can't eat without California and California cannot produce food for the nation without stored water.

In particular, California's Central Valley is one of the most important agricultural areas in the United States. This Court has noted that its transformation from the "Great American Desert" into irrigable land constitutes the "largest single undertaking yet embarked under the federal reclamation program."[30] The Central Valley by itself yields about 250 different crops, with an estimated value of $17 billion a year and produces a quarter of the nation's food, including 40% of the nation's fruits, nuts, and other table foods.[31]

As noted above, the Federal Circuit's decision – by potentially supporting largely unbounded reallocations of previously appropriated and stored water – has the potential to significantly undermine one of the

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https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf (last visited April 11, 2020).

[28] California Department of Food and Agriculture, *California Agricultural Statistics Review 2016-2017*, https://www.nass.usda.gov/Statistics_by_State/California/Publications/Annual_Statistical_Reviews/2017/2016cas-all.pdf (last visited April 10, 2020).

[29] *Id.*

[30] *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275, 280 (1958).

[31] United States Geological Survey, *California's Central Valley*, https://ca.water.usgs.gov/projects/central-valley/about-central-valley.html (last visited April 10, 2020).

critical legal pillars that has made it possible for California to simultaneously support the nation's largest state population and be the nation's most productive agricultural state. The likely result of any significant reductions in water supplies will be a reduction in cropping and in agricultural production, and the consequent reduction in food security for the nation.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for certiorari.

Respectfully submitted,

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