No. _____

In the

Supreme Court of the United States

CRV ENTERPRISES, INC.
and C. RYAN VOORHEES,
Petitioners,

v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court repudiated the so-called Notice Rule, which held that post-enactment purchasers could not state a claim for a regulatory taking arising from restrictions adopted before they took title to the property. The Federal Circuit's decision in this case—like the Ninth Circuit's decision in *Guggenheim v. City of Goleta*, No. 10-1125 (Petition for Writ of Certiorari docketed Mar. 11, 2011)—effectively revives the Notice Rule, fragmenting the Circuits in their interpretation of *Palazzolo*. The specific aspect of the issue presented by this case is: Does a post-enactment purchaser have standing to bring a regulatory takings claim arising from the implementation of preexisting regulations, if the previous owner could not have ripened a takings claim when the regulations were enacted?

2. When the federal government physically deprives a littoral property owner of the long-established right to access navigable waters by placing a log boom in a waterway, does the government incur liability for a physical taking notwithstanding that (1) neither the boom nor its supporting pilings are situated on the littoral owner's land, and (2) the government has not appropriated or diverted any water from the waterway?

LIST OF ALL PARTIES

All parties to this proceeding are named in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

CRV Enterprises, Inc., has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners CRV Enterprises, Inc. and C. Ryan Voorhees respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Federal Circuit Court of Appeals is reported as *CRV Enterprises, Inc. and C. Ryan Voorhees v. United States*, 626 F.3d 1241 (Fed. Cir. 2010), and is reproduced at Appendix A to this Petition. The order of the United States Court of Federal Claims granting the United States' motion to dismiss is reported as *CRV Enterprises, Inc. and C. Ryan Voorhees v. United States*, 86 Fed. Cl. 758 (2009), and is reproduced at Appendix B to this petition. The Judgment of the Court of Federal Claims appears at Appendix C to this petition.

JURISDICTION

The district court had jurisdiction to review this case pursuant to 28 U.S.C. § 1331. The decision of the Federal Circuit Court of Appeals was entered on November 17, 2010. Petition Appendix (App.) A-1. On February 7, 2011, Chief Justice Roberts granted Petitioners' timely application to extend the time within which to file the petition to March 17, 2011. No. 10A771. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[P]rivate property [shall not] be taken for public use without just compensation."

The Record of Decision of the United States Environmental Protection Agency for the McCormick & Baxter Superfund Site, Stockton, California, dated March 31, 1999, is set forth in pertinent part at Appendix D to this Petition.

STATEMENT OF THE CASE

Under California law, the owner of littoral property has a right of access to navigable waters "from every part of his frontage across the foreshore." *Marks v. Whitney*, 491 P.2d 374, 382 (Cal. 1971). This case involves a Fifth Amendment taking of littoral access rights by the placement of a log boom across a navigable waterway, immediately adjacent to the littoral owner's property

The property in question was acquired in 2002 by Petitioner CRV Enterprises, Inc., a California real estate development firm. Two years later, the property was transferred to Petitioner C. Ryan Voorhees (Voorhees), who is the owner, director, president, and primary managing officer of CRV Enterprises, Inc. For purposes of this Petition, Voorhees and CRV Enterprises, Inc., will be referred to collectively as "CRV."

A. Factual Background

1. EPA Identifies a Superfund Site on the South Side of Old Mormon Slough and Proposes Remediation Measures

The Old Mormon Slough (Slough) is a strip of navigable water, approximately 180 feet wide and 2,500 feet long, connected to the Stockton Deep Water Channel (Channel) in Stockton, California. App. B-2. The Channel connects the Slough to the Port of Stockton and, via the San Joaquin River, ultimately provides access to San Francisco Bay. *Id.*

For several decades, the McCormick and Baxter Creosoting Company operated a wood treatment facility bordering the south bank of the Slough. App. A-4. These operations ended in 1990, and two years later the United States Environmental Protection Agency (EPA) designated the McCormick and Baxter property a Superfund cleanup site under the Comprehensive Environmental Response, Compensation and Liability Act of 1980. *Id.* EPA undertook a variety of activities to determine the extent of soil and water contamination attributable to the creosote operation, and to design appropriate remediation measures. *Id.* No significant contamination was found to affect properties on the north side of the Slough, and no remediation measures were designated for those properties. *Id.*

From 1992 through 1999, EPA evaluated the extent of contamination in and around the Superfund site, and implemented containment measures. *Id.* After considering a range of long-term remediation plans, in March of 1999, EPA issued a Record of

Decision (ROD) describing the selected remedies. Relevant portions of the ROD are reproduced at Petition App. D; the ROD may be viewed in its entirety at: http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dc283e6c5d6056f88257426007417a2/2771f82db374386988257007006a2480!OpenDocument (last visited Mar. 7, 2011). The primary identified remedy called for capping the contaminated sediment at the bottom of the Slough under at least two feet of sand. App. D-11. The ROD also called for "institutional controls" to regulate access to the Slough to prevent disturbance of the sand cap. App. D-21. The institutional control measures to be implemented were unspecified, although the ROD noted that access to the Slough would be restricted by "warning signs or log booms[] and/or to the extent available, land use restrictions." App. D-10.

Although the ROD estimated the time required to design and implement the sediment cleanup remedies at seven to eight months, no measures to cap the Slough or restrict navigational access were undertaken over the next six years. App. D-28; App. B-7. In September of 2005, EPA announced significant modifications to the remediation measures proposed in the ROD, which were detailed in an Explanation of Significant Differences. Joint Appendix on Appeal, Vol. I at 359-60.

2. CRV Purchases Uncontaminated Property on the North Side of Old Mormon Slough for a Marina-Based Development

In August of 2000, CRV entered into an option to purchase a nine-acre tract (the marina site) on the northern bank of the Slough, across from the

Superfund parcel. App. A-5. The previous owner had dredged the Slough fronting the marina site and had installed improvements enabling the ongoing use of the property for commercial marine purposes. App. B-5. CRV planned to develop the tract further, in conjunction with two neighboring properties CRV already owned, for a marina and related commercial uses. CRV exercised its option to purchase the marina site in November of 2002. App. A-6. Both before and after the purchase, CRV met with EPA personnel to try and ensure that the Agency's implementation of remediation measures would not deprive the marina site of its littoral access rights. App. A-5-6.

3. EPA Places a Log Boom Across the Slough, Permanently Eliminating Access to Navigable Waters from Most of CRV's Marina Site

In the summer of 2006, EPA finally began implementing the ROD, capping a portion of the bottom of the Slough and driving two pilings near its mouth. App. A-6. A log boom was then strung between the pilings, permanently closing off the Slough to marine traffic. App. A-6-7. The placement of the boom foreclosed access to the Channel from most of the foreshore of CRV's property, rendering it useless for a marina-based development or for any other maritime use. App. A-7.

B. Judicial Proceedings

1. CRV Files a Takings Lawsuit in 2003, Which Is Dismissed as Unripe by Stipulation

Notwithstanding a series of meetings with EPA to seek a remediation plan that would preserve CRV's

littoral rights, by 2003 CRV became convinced that the Agency was determined to seal off the Slough near its mouth with a permanent log boom, foreclosing all future marine access. Based on this conviction, on April 30, 2003, CRV filed an inverse condemnation action against the Government in the Court of Federal Claims. App. B-7. The United States responded with a motion for judgment on the pleadings on the grounds that, inter alia, the takings claim was not ripe for adjudication since no denial of access from CRV's marina site to either the Slough or the Channel had in fact occurred. *Id.*

Given that EPA had taken no steps to implement the ROD, CRV and the Government filed a joint motion to stay proceedings on the grounds that the inverse condemnation claim would not ripen "unless and until the EPA undertakes activities that Plaintiff believes blocks its navigational access, in part or in whole, to the Old Mormon Slough and the Stockton Channel." App. A-6. When it became apparent that no implementation activity was imminent, and that CRV's access rights remained unimpaired, the parties subsequently stipulated to a dismissal without prejudice, which was entered on May 4, 2005. *Id.*

2. CRV's 2006 Takings Lawsuit Is Dismissed by the Court of Federal Claims

In September of 2006, following EPA's installation of the log boom across the Slough, CRV filed a second complaint in inverse condemnation, seeking just compensation for the taking of its property. App. B-7. The Court of Federal Claims dismissed the action, this time holding that CRV's regulatory takings claim was ripe for adjudication at the time of the issuance of the

1999 ROD, and that it was now barred by the six-year statute of limitations. App. B-23. Alternatively, the court held that CRV did not have standing to assert a regulatory takings claim because it did not purchase the property until after the ROD had issued. App. B-24. Finally, the court ruled that CRV had failed to state a claim for a physical taking, since the EPA's pilings and boom were situated in the Slough, not on CRV's land. App. B-12-13.

3. The Dismissal of CRV's Takings Claim Is Affirmed by the Federal Circuit

On appeal, the Federal Circuit Court of Appeals affirmed. The appellate panel correctly noted that "[r]iparian and littoral rights do not convey ownership to [*sic*] the water but only rights to use the water." App. A-9. The panel also recognized that "action not occurring on a plaintiff's land can still lead to a physical taking of water rights." *Id.* Yet instead of pursuing this logic to its natural conclusion, by determining whether EPA's actions had physically deprived CRV of its littoral rights to access navigable waters, the court below leaped to the unprecedented conclusion that there can be no physical taking of water rights unless the water itself has been seized or diverted. App. A-11-13.

With respect to CRV's regulatory takings claim, the Federal Circuit did not reach the trial court's holding that the action was time-barred. App. A-14. Instead, the appellate panel found that CRV lacked standing to bring the claim, since it did not acquire the marina site until after EPA had issued its 1999 ROD. *Id.* Unlike the Court of Federal Claims, the court below recognized that such a holding clearly implicates

the doctrine of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), in which this Court held that a regulatory takings claim cannot be extinguished by the mere transfer of title to regulated property.

The only basis upon which the court below could distinguish its holding from the contrary rule of *Palazzolo* was to declare that the vaguely specified, disjunctive guidelines of the ROD itself comprised a final agency decision as to precisely how EPA's remediation measures would impact CRV's property. App. A-15. The Federal Circuit did not address this Court's standard for evaluating administrative finality, that the agency must have no further discretion over how the regulations shall be applied, or how that standard could be satisfied by the language of the ROD itself and the Agency's subsequent adoption of the 2005 Explanation of Significant Differences. The effect of the decision was simply to reiterate the discredited holding of the Rhode Island Supreme Court in *Palazzolo*—that once restrictions on the use of property are adopted, they become background principles of law that cannot be challenged by a subsequent purchaser of regulated property.

CRV timely files this petition for certiorari.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for certiorari and either summarily reverse, grant and hold pending the Court's disposition of *Guggenheim v. City of Goleta*, No. 10-1125 (Petition for Writ of Certiorari docketed Mar. 11, 2011), or schedule the case for full briefing

and argument. On two important questions of takings law, the decision of the court below is inconsistent with the decisions of this Court and the decisions of other Circuits. Uniformity in the application of the Takings Clause by the federal judiciary can only be achieved if these conflicts are resolved by this Court.

I

THE FEDERAL CIRCUIT HAS JOINED THE NINTH CIRCUIT IN CIRCUMVENTING THIS COURT'S HOLDING IN *PALAZZOLO v. RHODE ISLAND*, ADDING TO THE FRAGMENTATION OF THE CIRCUITS ON WHETHER THE RIGHT TO BRING A FIFTH AMENDMENT TAKINGS CHALLENGE CAN SURVIVE A CONVEYANCE OF THE REGULATED PROPERTY

A. *Palazzolo* Established That Takings Claims Survive a Transfer of Ownership After the Adoption of Measures To Restrict the Use of Property

In *Palazzolo v. Rhode Island*, this Court was asked to determine whether a property owner "deemed to have notice of an earlier-enacted restriction . . . is barred from claiming that it effects a taking." 533 U.S. at 626. The case was thought to be the culmination of a judicial trend that gained momentum throughout the 1990s, whereby takings claims were summarily dismissed under the so-called "Notice Rule": when the title to property changes hands, the new owner is deemed to have purchased with notice of all existing

land-use regulations, and is forever barred from challenging them as violating the Takings Clause. *Id.* at 613.

This rule was applied by the Rhode Island Supreme Court when Anthony Palazzolo sued for a taking, based on the denial of his application to develop wetlands on his property. The state court held that, because restrictive wetlands regulations had been adopted before Palazzolo acquired title to the parcel, he was precluded from bringing a takings claim based on the impact of the regulations on his land:

"Here, when Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired." *Palazzolo v. Rhode Island*, 746 A.2d 707, 716 (R.I. 2000). A claim for a taking, under this doctrine, could be stated only by the owner of record at the time restrictive measures are adopted. Any subsequent transfer of title forever extinguishes any possibility of bringing such a claim, since "all subsequent owners take the land subject to the pre-existing limitations and without the compensation owed to the original affected owner." *Id.* at 716-17.

Reversing the Rhode Island Supreme Court in *Palazzolo*, this Court flatly rejected the Notice Rule. A doctrine that bars post-enactment buyers from challenging regulations under the Takings Clause would impermissibly allow the State to "shape and define property rights . . . and subsequent owners cannot claim any injury from lost value." 533 U.S. at 626. Writing for the majority, Justice Kennedy observed that such a rule

> would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule.

Id. at 627.

Unfortunately, the attractiveness of the Notice Rule to courts seeking a quick and clean way to resolve takings claims in favor of the government has proven stronger than the force of its repudiation in *Palazzolo*. Many lower courts, both state and federal, have continued to apply the Notice Rule de facto, routinely barring subsequent purchasers from asserting regulatory takings claims under a wide variety of pretexts. *See* J. David Breemer & R. S. Radford, *The (Less) Murky Doctrine of Investment-Backed Expectations After* Palazzolo *and* Tahoe-Sierra *and the Lower Courts' Disturbing Insistence on Wallowing in the Pre*-Palazzolo *Muck*, 34 Sw. U.L. Rev. 351, 402-17 (2005). The case at bar exemplifies such an exercise in judicial ingenuity.

B. This Case, like *Guggenheim v. City of Goleta*, Exemplifies the Extreme Lengths to Which Some Circuit Courts of Appeals Have Gone To Avoid Complying with This Court's Teaching in *Palazzolo*

1. The Court Below Invoked an Illusory "Ripeness" Issue To Bar CRV, as a Post-Enactment Purchaser, from Asserting a Regulatory Takings Claim

In a prescient passage headed "Interaction with Ripeness Principles," written shortly after *Palazzolo* was handed down, Professor Eagle noted: "It might be tempting for a reviewing court otherwise inclined to find for the government in a takings case to . . . [foreclose a claim brought by a subsequent buyer] by asserting that the burden of a regulation inures only against the owner at the time it was promulgated." Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 Haw. L. Rev. 533, 576 (2002).

That is precisely what the Federal Circuit asserted in the case at bar. Despite the stipulation of the parties to the contrary, the court below held that CRV's regulatory taking claim had ripened upon EPA's adoption of the ROD, with its references to future "institutional controls," in March of 1999. App. A-16. CRV's acquisition of the parcel then permanently extinguished any property rights that might one day be abrogated by implementation of the ROD. App. A-17.

However, as Prof. Eagle went on to observe: "It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer

of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner." Eagle, *Notice Rule* at 576. In particular, he pointed to "the Court's Byzantine Williamson County ripeness rules," which often make it exceedingly difficult for a landowner to demonstrate that a takings claim is ripe for adjudication against the government. *Id.* at 577. If the court below had applied these same stringent ripeness requirements, it would have been obvious that no regulatory takings claim could have been asserted against EPA in 1999.

EPA's mere issuance of the ROD plainly failed to meet the requirements for stating a claim for either a facial or an as-applied taking. A facial takings claim must allege that "no set of circumstances exists" under which the regulation could be implemented without violating the Constitution. *United States v. Salerno*, 481 U.S. 739, 745 (1987). The ROD's repeated references to "institutional controls," and to restricting access by means of "warning signs or log booms[] and/or . . . land use restrictions," App. D-10, could not possibly satisfy this criterion, due to the wide range of implementation options left open by the plain language of the document.

Similarly, under *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 200 (1985), an as-applied takings claim does not ripen until "a final decision is made as to how the regulations will be applied to [the plaintiff's] property." For such a final decision to exist in this case, it must be shown that the Agency had no further discretion over the extent to which the regulations will interfere with the use of CRV's property. *Suitum v.*

Tahoe Reg'l Planning Agency, 520 U.S. 725, 739 (1997). As the Federal Circuit itself has noted, outside the context of a post-enactment purchaser: "To allow a claim to ripen on the assertion that the exercise of an agency's discretion would have a certain result, without permitting the agency to exercise that discretion would offend the requirement from *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), that the issue be fit for review." *Morris v. United States*, 392 F.3d 1372, 1377 (Fed. Cir. 2004).

Here, the range of choices expressly left open under the ROD, together with the Agency's subsequent implementation of measures that significantly differed from the provisions of the ROD, leave no possible basis for alleging that EPA's discretion over the choice of remediation measures came to an end in March of 1999. Because CRV's predecessor in interest could not have stated a ripe takings claim against the Agency based upon the mere issuance of the ROD in 1999, it is clear that CRV's regulatory takings claim was dismissed solely because CRV "did not own the property when EPA issued its ROD," App. A-14, in plain conflict with this Court's holding in *Palazzolo*.

2. While the Federal Circuit Was Invoking an Illusory "Ripeness" To Foreclose a Takings Claim by a Post-Enactment Purchaser, the Ninth Circuit Was Doing the Same by Limiting *Palazzolo* to Its Facts

The fragmentation of the Circuit Courts of Appeals over the application of *Palazzolo* is illustrated by another petition for certiorari currently pending before this Court, in *Guggenheim v. City of Goleta*. *Guggenheim* involves a challenge to a regulatory

wealth transfer effected by a mobile home park rent control ordinance. *Guggenheim v. City of Goleta*, No. 06-56306, 2010 U.S. App. LEXIS 25981 (9th Cir. 2010). The property was already subject to rent control under a Santa Barbara County ordinance at the time the petitioner purchased it. *Id.* at *7. An *en banc* panel of the Ninth Circuit found that fact to be dispositive, holding that a subsequent purchaser could have no expectation that a successor ordinance imposed by the City of Goleta could be struck down as an unconstitutional taking. *Id.* at *23-*24.

Like the court below, the *en banc* panel in *Guggenheim* recognized the tension between its ruling and the teaching of this Court in *Palazzolo*. In order to uphold the City of Goleta's wealth transfer, the Ninth Circuit effectively limited *Palazzolo* to its facts:

> [E]ven though in *Palazzolo* title passed to the plaintiff after the land use restriction was enacted, he acquired his economic interest as a 100% shareholder in the corporation owning the land before the land use restriction was enacted, and title shifted to him because his corporation was dissolved, not because he bought the property.

Id. at *18. As Judge Bea pointed out in dissent, this and other superficial distinctions cited by the *Guggenheim* majority to justify its circumvention of *Palazzolo* "are mere differences, no more significant than that the Palazzolo land was in Rhode Island and the Guggenheim land was in California." *Id.* at *48-*49 (Bea, J., dissenting).

Had it wished to do so, the Ninth Circuit panel in *Guggenheim* could equally well have opted for the same rationale as the Federal Circuit in the case at bar. The Santa Barbara County rent control ordinance was enacted in 1979, and clearly purported to restrict the rents that could be charged in the Ranch Mobile Estates mobile home park, which was subsequently purchased by Guggenheim. *Id.* at *3-*7. Because Guggenheim's predecessor in interest did not file suit to challenge the ordinance as a taking at its inception, the Ninth Circuit panel could have held that the Assignment of Claims Act barred any subsequent purchaser from filing such a challenge—as was in fact held by the court below in the present case. App. A-14, n.7. Alternatively, the court below could equally well have sought to distinguish *Palazzolo* on its facts, since CRV, like Guggenheim, acquired the property at issue by purchase, rather than by operation of law. The only legally significant distinction between the case at bar and *Guggenheim* is the specific pretext by which the respective Court of Appeals sought to avoid applying this Court's holding in *Palazzolo*.

This Court should grant the Petition for Writ of Certiorari to restore uniformity among the Circuits in the treatment of regulatory takings claims brought by plaintiffs who purchase property subject to restrictive regulations.

II

CERTIORARI SHOULD BE GRANTED TO ESTABLISH UNIFORMITY AMONG THE CIRCUITS IN THE INTERPRETATION AND APPLICATION OF THIS COURT'S PHYSICAL TAKINGS DOCTRINE

A. Certiorari Should Be Granted Because the Federal Circuit's Decision Contravenes This Court's Long-Standing Physical Takings Doctrine and Conflicts With a Long Line of Authority in the Lower Courts

1. The Federal Circuit's Holding on the Physical Taking Issue Conflicts With the Settled Doctrine of This Court

The Federal Circuit's decision below holds that—absent actual diversion or depletion of a waterway—a private right of access to navigable waters is protected under the physical takings doctrine only if the government places an obstruction on the plaintiff's land. App. A-9-11. This holding is in direct conflict with the long-standing precedent of this Court, that the government incurs takings liability for the physical obstruction of a private right of access, regardless of the placement of the obstruction.

This Court has long recognized that the abrogation of private property rights by physical means gives rise to liability for just compensation under the Takings Clause. *See United States v. Causby*, 328 U.S. 256, 264 (1946) ("[T]he flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry

upon it."); *Portsmouth Harbor Land and Hotel Co. v. United States,* 260 U.S. 327, 330 (1922) (discharging artillery over petitioner's land can result in takings liability). This rule applies whenever property rights are abrogated by means of a physical instrumentality, regardless of whether the government actually invades the boundaries of a landowner's real property. *See Causby,* 328 U.S. at 265 (stating that it was "irrelevant" whether the government actually entered plaintiffs' property, because flights above the property had interfered with its use); *see also United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 754 (1950) (recognizing a right to compensation for loss of water rights resulting from government actions occurring beyond the perimeters of claimant's real property). The rule applies with equal force when access easements are taken by physical means. *United States v. Welch*, 217 U.S. 333, 339 (1910).

In *Welch*, this Court held that a takings claim must be recognized when the government acts to physically impede an access easement across the property of another. *Id.* In that case the government was held to have taken the petitioner's access easement by the construction of a dam on a river some distance away, because the dam raised the waters of a tributary creek, inundating a neighboring property and thereby terminating the petitioner's use of the easement. *Id.* Similarly, in *United States v. Cress*, 243 U.S. 316 (1917), this Court illustrated the far-reaching application of the physical takings doctrine in holding that the government incurs takings liability when it acts to physically obstruct a waterway in a manner that abrogates the state-recognized littoral rights of private property owners. In that case, a physical obstruction—placed wholly within the

waters of the United States—effected a taking because it slowed the current of a stream, so as to terminate a littoral landowner's right, under Kentucky law, to use the current to power his mill. *Id.* at 330.

In the case at bar, the Federal Circuit correctly recognized that CRV has the right under California law, as a littoral owner, to access the navigable waters of the San Joaquin River from every inch of its shoreline. App. A-3-4. However, the court below went on to hold that there was no physical taking because EPA had not appropriated or removed the waters of the Slough, but had merely abrogated CRV's right of access by placing a physical obstruction in the Slough. App. A-11-13. This ruling has no basis in law and plainly conflicts with the aforementioned decisions of this Court, and merits review for that reason alone.

2. The Federal Circuit's Holding on the Physical Taking Issue Is Inconsistent With the Third Circuit and Conflicts With Decisions of Other Federal Courts

Not only does the opinion below contravene *Cress* and *Welch*, it stands in direct conflict with a line of cases adhering to the rule that government actors are liable for physical obstructions to access rights. *See United States v. Smith*, 307 F.2d 49, 57 (5th Cir. 1962) (In stressing that this is a long-standing rule, the Fifth Circuit noted that the *Welch* case, underlying its decision, "[had] been cited without question in sixty cases, twenty-one of which were by the Supreme Court." *Id.* at 54.).

Most notably, the Federal Circuit's decision is patently inconsistent with the Third Circuit's holding that the government incurs takings liability for physically obstructing a private owner's right of access to navigable waters. *United States v. 50 Foot Right of Way*, 337 F.2d 956, 960 (1964). In *50 Foot Right of Way* the federal government installed a large pipe along the bed of the Newark Bay in New Jersey. In doing so, the government obstructed a littoral landowner's right to access the navigable waters of the bay. The Third Circuit held that just compensation was owed for a physical taking by virtue of the simple fact that, in obstructing access to navigable waters, the government had effectively destroyed a compensable property right. *Id.*

The conflict between the Third and Federal Circuits on this issue could not be more clear. Nevertheless, in the opinion below, the Federal Circuit purported to distinguish *50 Foot Right of Way* on the ground that, under New Jersey law, the claimant in that case also owned the bed of the waterway upon which the pipe was installed. App. A-9 n.5. The Third Circuit, however, made it clear that the owner was to be compensated for two separate constitutional violations—the pipe's physical occupation of the bed of the waterway and, independently, the obstruction of the owner's access to navigable waters. *50 Foot Right of Way*, 337 F.2d at 960. The holding of the Federal Circuit below, that physical obstruction of access is not compensable unless it is accompanied by a permanent physical occupation of the claimant's land, finds no support in *50 Foot Right of Way*.

The Federal Circuit's conclusion that interference with a state-recognized right of access is

non-compensable if the source of the obstruction does not rest upon private land conflicts with a long line of cases recognizing that the loss of a private right of access comprises an independent basis for compensation. *See United States v. Grizzard,* 219 U.S. 180, 185-86 (1911) (the value of a right of access to a public road was held to be compensable once obstructed, independent of any compensation owed for flooding the claimant's land); *see also Schiefelbein v. United States*, 124 F.2d 945, 946 (8th Cir. 1942) (recognizing a physical takings claim for the obstruction of a private right of access, despite the fact that "[n]o part of the [claimant's] tract . . . was taken or touched by the taking"). Given that the Federal Circuit's decision below contravenes these precedents, and splinters authority among the Circuits applying the physical takings doctrine, this Court should grant certiorari to resolve these conflicts and to clarify the doctrine.

B. Certiorari Should Be Granted Because of the Unusual Nationwide Importance of Ensuring That the Federal Circuit Does Not Depart from the Other Circuit Courts of Appeals in Its Interpretation and Application of This Court's Physical Takings Doctrine

The Federal Circuit's departure from the existing precedent of this Court and other Circuits is of particular importance because "the law of inverse condemnation [is] primarily developed in the [Federal Circuit]." *Lenoir v. Porters Creek Watershed Dist.*, 586 F.2d 1081, 1094 (6th Cir. 1978). This is because of the Circuit's unique role in reviewing appeals from the Court of Federal Claims, which in turn has exclusive

jurisdiction to adjudicate takings claims against the United States for money damages brought under the Tucker Act, 28 U.S.C. § 1491(a)(1). As such, the Federal Circuit's decision in this case will have precedential effect upon almost all takings claims brought against the United States.

The departure of the opinion below from the physical takings jurisprudence of this Court and other Circuits will create grave uncertainty and confusion in the standards for establishing takings liability against the federal government. It could also result in one standard of liability under the Fifth Amendment being applied to the federal government by the Federal Circuit, and a completely different and inconsistent standard being applied to other governmental entities in the other Circuits. Accordingly, it is of unusual nationwide importance to dispel the cloud of doctrinal confusion that the decision below has cast over the physical takings doctrine. *See Causby*, 328 U.S. at 258 ("[W]e granted certiorari because of the importance of the question presented."); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 166 (1979) (granting certiorari because of the importance of understanding the scope of federal liability for physical takings in the navigable waters of the United States).

Only this Court can establish much-needed consistency among the Circuits on the scope and application of the physical takings doctrine, and assure uniform treatment of takings claims brought against the United States and other governmental entities.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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