No. 22-969

In the Supreme Court of the United States

CITY OF SANTA MARIA, CALIFORNIA, ET AL.,
PETITIONERS

v.

SAN LUIS OBISPO COASTKEEPER, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Act of September 3, 1954, Pub. L. No. 83-774, 68 Stat. 1190, which authorized the construction and operation of Twitchell Dam in California, the Bureau of Reclamation and the Santa Maria Water Conservation District have discretion to operate the dam in the manner allegedly required to avoid take of Southern California steelhead protected under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulation:

Statutes and regulation—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–50a) is reported at 49 F.4th 1242. The opinion of the district court granting summary judgment to petitioners and federal respondents (Pet. App. 51a–74a) is not published in the Federal Supplement but is available at 2021 WL 1918789.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2022. A petition for rehearing en banc was denied on January 3, 2023 (Pet. App. 75a). The petition for a writ of certiorari was filed on April 3, 2023.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Twitchell Dam is located in California on the Cuyama River, which joins with the Sisquoc River at Fugler Point to form the Santa Maria River, before flowing into the Pacific Ocean. Respondent the Bureau of Reclamation (Bureau) holds title to the dam, and petitioner the Santa Maria Valley Water Conservation District (District) operates it. In 2019, respondents San Luis Obispo Coastkeeper and Los Padres ForestWatch sued the Bureau and the District, alleging that the dam's operations "take" endangered Southern California steelhead in violation of the Endangered Species Act of 1973 (ESA), Pub. L. No. 93-205, 87 Stat. 884 (16 U.S.C. 1531, *et seq.*) Petitioners Golden State Water Company and City of Santa Maria intervened as defendants. The district court granted summary judgment to the Bureau and petitioners. Pet. App. 51a-74a. A divided panel of the Ninth Circuit reversed and remanded. *Id.* at 1a-50a.

1. a. The Act of September 3, 1954 (Public Law 774), Pub. L. No. 83-774, 68 Stat. 1190, authorized the Secretary of the Interior (Secretary) to construct Twitchell Dam and Reservoir[1]

> for irrigation and the conservation of water, flood control, and for other purposes, on Santa Maria River, California, pursuant to the laws of California relating to water and water rights, and, otherwise

[1] The project was initially named Vaquero Dam and Reservoir. See Public Law 774. It was renamed Twitchell Dam and Reservoir in 1957. See Thomas A. Latouse, Bureau of Reclamation, *Santa Maria Project* 2 (1996).

> substantially in accordance with the recommendations of the Secretary of the Interior dated January 16, 1953 * * * in relation to the * * * Dam and Reservoir and any other conservation feature of the project.

The Secretary's recommendations are set forth in House Document No. 217, H.R. Doc. No. 217, 83d Cong., 1st Sess. (1953) (Secretary's Report). See Pet. App. 195a-270a.

As the Secretary's Report explained, the Twitchell project's "dual purpose" is "to provide adequate recharge" of the "critically depleted ground-water reservoir underlying the Santa Maria River Valley, and to eliminate the threat of extensive flood damage to the cities, industries, and agriculture of the valley." Pet. App. 213a-214a. Before the project, the dwindling groundwater supply in the dry summer months and the threat of floods during winter storms in the short rainy season were endangering the valley's economic stability. The project was designed to address both issues "by conservation of floodwaters presently wasted to the ocean" during the rainy season, "and by construction of works to control the floods." *Id.* at 214a.

The Secretary's Report specified that the Twitchell project's water-conservation purpose would be achieved by "detain[ing] Cuyama River flows during periods of waste flow to the ocean, and subsequently releas[ing] the conserved water at rates equal to, or less than, the percolation capacity of Santa Maria River Channel." Pet. App. 214a. Doing so would result in "the maximum yield from reservoir operation" and "maximum percolation into the ground-water basin." *Id.* at 228a. Any larger flows would "waste to the ocean." *Ibid.*

Twitchell Reservoir was designed to provide 214,000 acre-feet of storage capacity, with specific acre-feet expressly allocated for flood control and water conservation. Pet. App. 224a. The particular capacity was selected because it would allow for conservation of "all the flood flows of the Cuyama River" except in "exceptionally high runoff years," thus providing "the maximum yield consistent with economical use of storage space." *Id.* at 229a-230a. In contrast, the Secretary rejected a design with fewer acre-feet allocated for water conservation because it would have allowed "much of the available runoff to escape to the ocean." *Id.* at 229a.

The Secretary's Report specified that "[w]ater held in the conservation-storage space would be used to recharge the underlying ground-water basin from which the entire valley obtains its water supply." Pet. App. 224a. Conserved water stored in the underground aquifer would be used for irrigation as well as "anticipated municipal and industrial growth," "to arrest the constantly increasing cost of pumping," and "to remove the threat of salt-water intrusion" into the groundwater basin. *Id.* at 220a.

Because of the groundwater aquifer's ample storage capacity, no extra water would be stored in the reservoir that could be allocated to other uses. Reservoir storage "would be only for a few months following each rainy season, while releases for percolation into the riverbed are made. The remainder of the year, and all during dry years, the reservoir would be empty." Pet. App. 227a-228a. "[A]ll holdover storage would be maintained in the ground-water reservoir." *Id.* at 214a.

Congress appropriated $16,982,000 for the project, Public Law 774, § 2, 68 Stat. 1190, with $13,969,000 "allocated to water conservation" and the remaining

$3,013,000 "allocated to flood control," See H.R. Rep. No. 1098, 83d Cong., 2d Sess. 2 (1954); S. Rep. No. 1789, 83d Cong., 2d Sess. 2 (1954); see also Secretary's Report 1. No funding was provided for any other purpose. *Ibid.*

b. The Secretary's Report included the views of the U.S. Fish and Wildlife Service (FWS) and the California Department of Fish and Game (CDFG), considering the project's effects on fish and wildlife, including steelhead, as required by the Act of August 14, 1946 (1946 Act), ch. 965, 60 Stat. 1080.[2] See Pet. App. 233a-241a, 246a-254a. That Act required the Bureau to consult with FWS and CDFG before impounding Cuyama River water "with a view to preventing loss or damage to wildlife resources," including fish. 1946 Act § 2, 60 Stat. 1080; see § 8, 60 Stat. 1082. The reports of FWS and CDFG regarding "possible damage to wildlife resources" and any "means and measures that should be adopted" to prevent such damage had to be "made an integral part" of the project plans submitted to Congress. § 2, 60 Stat. 1081. And the Bureau was obligated to include the costs of any such measures and "make findings on the part of the estimated cost of the project which can properly be allocated to the preservation and propagation of fish and wildlife." *Ibid.*

After considering the project's potential impacts on steelhead in the Santa Maria River system, FWS and CDFG declined to recommend any means or measures to maintain steelhead runs or to facilitate steelhead migration to and from the Pacific Ocean. Pet. App. 233a-241a, 246a-254a. In particular, CDFG did "not feel jus-

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[2] The 1946 Act is a predecessor to the Act of August 12, 1958, Pub. L. No. 85-624, 72 Stat. 563 (16 U.S.C. 661 *et seq.*).

tified in requesting extensive requirements in an attempt to perpetuate the steelhead runs." *Id.* at 253a. CDFG concluded that it would "not require a fish ladder at [Twitchell] Dam for passage of migratory fishes," and that it was not "feasible to request a regular schedule of water releases for maintenance of a stream fishery" because of "the great width and pervious character of the riverbed below the proposed dam." *Ibid.*

In accordance with the views of FWS and CDFG, the Secretary did not recommend any measures for steelhead passage, concluding in his final report to Congress that "no modification of the proposed plan of development is necessary." Pet. App. 201a. Congress approved that decision by authorizing the project "substantially in accordance with" the Secretary's Report. Public Law 774, 68 Stat. 1190.

c. In 1973, Congress enacted the ESA, which provides for the listing of species as threatened or endangered and for the designation of critical habitat for listed species. See 16 U.S.C. 1533. Section 9 of the ESA makes it "unlawful for any person" (including a state or federal agency) to "take" members of an endangered species. 16 U.S.C 1538(a)(1)(B); see also 16 U.S.C. 1532(13) (defining "person"). The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). "Harm" means "an act which actually kills or injures fish or wildlife," including through "significant habitat modification or degradation." 50 C.F.R. 222.102 (emphasis omitted). In 1997, Southern California steelhead were listed as endangered and therefore protected by the ESA's take prohibition. See 62 Fed. Reg. 43,937, 43,945 (Aug. 18, 1997).

d. Construction of Twitchell Dam and Reservoir was completed in 1958. Pet. App. 8a. The Bureau "is responsible for establishing the operational rules for Twitchell Dam," while the District "handles the day-to-day operation of the dam, in accordance with" those rules. *Id.* at 10a. Consistent with the Secretary's Report, the operational rules "prohibit[] releases from Twitchell Dam that would result in combined instream flows exceeding 300 cubic feet per second at Fugler Point," which is the percolation capacity of the Santa Maria River aquifer. *Id.* at 53a (citation omitted); see *id.* at 228a.

2. a. In 2019, respondents San Luis Obispo Coastkeeper and Los Padres ForestWatch (collectively, Coastkeeper), sued the Bureau and the District (the Agencies) alleging that the operation of Twitchell Dam takes Southern California steelhead in violation of Section 9 of the ESA. Pet. App. 52a. Specifically, Coastkeeper alleged that by limiting water releases to the downstream river channel's percolation capacity, the Agencies are hindering steelhead migration between the Pacific Ocean and spawning habitat in the Sisquoc River. *Id.* at 52a-53a.

Coastkeeper alleged that to remedy that unlawful take, the Agencies must release additional water to establish a periodic surface water connection to the ocean that will facilitate steelhead migration. See Pet. App. 53a. Coastkeeper alleged that the necessary additional releases would amount to 1500 acre-feet of water per year, or four percent of the average volume of water stored annually in Twitchell Reservoir. See *id.* at 22a. The complaint sought declaratory and injunctive relief, including an order directing the Agencies to modify the

current flow regime in the manner allegedly required to avoid the take of steelhead. *Id.* at 53a.

b. The district court entered summary judgment for the Bureau and petitioners. Pet. App. 51a-74a. The court held that the Agencies are not legally responsible for any take of steelhead resulting from Twitchell Dam's release limit because the Agencies lack authority under Public Law 774 to make the additional releases allegedly required to avoid take of steelhead. *Id.* at 60a-74a. The court explained that such releases would conflict with the dam's "fundamental function" under Public Law 774, which is "to salvage all water that would otherwise be wasted to the ocean, and then conserve it underground by maximizing groundwater recharge." *Id.* at 70a. As such, the releases could not be included among the "other purposes" that the statute authorized, and the court concluded that the Agencies "are not empowered to provide them." *Id.* at 73a.

3. A divided panel of the court of appeals reversed and remanded. Pet. App. 1a-50a.

a. The court of appeals concluded that the Agencies have sufficient discretion under Public Law 774 to make the additional water releases allegedly required to avoid take of steelhead. Pet. App. 7a-50a. The court reasoned that, by using "expansive language" to authorize the operation of Twitchell Dam for "other purposes" in addition to irrigation, conservation of water, and flood control, Congress "grant[ed] the Agencies discretion to operate the dam for a variety of purposes," including for ESA compliance. *Id.* at 12a (citation omitted).

The court of appeals rejected the Agencies' reliance on Public Law 774's requirement that the dam be operated "substantially in accordance" with the Secretary's

Report, which includes specifications that water releases should be limited to the downstream river channel's percolation capacity. Pet. App. 12a-13a (citation omitted). The court concluded that operating Twitchell Dam to avoid the take of steelhead complied with the statutory directive because water releases only "would need to deviate slightly from the recommended flow rate at a few points throughout the year," and therefore would meet "[t]he statutory requirement of substantial compliance—rather than strict compliance—with the Report." *Id.* at 13a.

The court of appeals also reasoned that its reading of Public Law 774 properly "harmonized" that statute with the ESA's take prohibition. Pet. App. 14a (citation omitted); see *id.* at 13a-17a. The court found "no implied conflict between [Public Law] 774 and the ESA," because Twitchell Dam could "readily be operated to provide modest releases at certain times of the year * * * while still satisfying the dam's primary purpose of conserving water for consumptive uses." *Id.* at 14a.

b. Judge Bea dissented. Pet. App. 21a-50a. He concluded that Congress rejected steelhead preservation as an authorized project purpose when it approved the Secretary's Report, which included FWS's and CDFG's recommendations against providing water releases for steelhead. *Id.* at 29a-31a. Judge Bea further concluded that the rule of *ejusdem generis* cabined the meaning of the "other purposes" for which Twitchell Dam is authorized to those like the enumerated purposes of irrigation, flood control, and water conservation, which relate to human use of diverted water once it has recharged the groundwater aquifer. *Id.* at 32a-35a, 40a. Judge Bea also reasoned that the majority's interpretation of Public Law 774 violated the nondelegation doctrine because

the broad authority vested in the agencies was not subject to any limiting principle. *Id.* at 41a-43a.

ARGUMENT

The court of appeals erred in holding that Public Law 774 provides the Agencies with discretion to operate Twitchell Dam in the manner that petitioners allege is required to avoid take of endangered steelhead. Nevertheless, this Court's review is unwarranted because the court of appeals' decision does not satisfy this Court's criteria for plenary review at this interlocutory stage. There is no split among the circuits regarding the meaning of Public Law 774, which is a narrow provision governing the operation of a single dam and reservoir. The court of appeals' conclusion that the Agencies have discretion under the statute to "deviate slightly" from the required release limit, Pet. App. 13a, does not raise any constitutional concerns under the nondelegation doctrine. And the court's decision does not implicate questions of federalism, as the court specifically declined to address any applicable state-law requirements, leaving those issues "for consideration by the district court in the first instance." *Id.* at 20a. Finally, although the court of appeals' erroneous decision could reduce the amount of water available to groundwater users, the extent of any reduction is uncertain because the amount of water required to avoid take of steelhead has not yet been determined. The petition for a writ of certiorari should be denied.

1. a. The court of appeals erred in concluding that Public Law 774's reference to "other purposes," 68 Stat. 1190, "reflects a congressional intent to grant the Agencies discretion to operate [Twitchell Dam] for a variety of purposes," including to facilitate steelhead migration to and from the Pacific Ocean, Pet. App. 12a.

When interpreting a statute, courts do not focus on a particular term "in isolation." *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004). "Instead, [courts] follow 'the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it.'" *Ibid.* (quoting *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 596 (2004)) (second set of brackets in original). The court of appeals' interpretation of Public Law 774 is inconsistent with those basic principles of statutory construction.

Public Law 774 authorized Twitchell Dam and Reservoir "for irrigation and the conservation of water, flood control, and for other purposes * * * substantially in accordance with the recommendations" in the Secretary's Report relating to the dam, reservoir, "and any other conservation feature of the project." 68 Stat. 1190. Sending stored water to the Pacific Ocean to facilitate steelhead migration conflicts with the Secretary's detailed recommendations and is not properly regarded as an "other purpose" authorized by the statute.

The Secretary's Report shows that the project's water conservation operations were intended to prevent Cuyama River floodwaters from escaping to the ocean (described in the report as "waste flow") and to maximize storage of conserved floodwaters in the groundwater aquifer by limiting releases to the downstream channel's percolation capacity. Pet. App. 214a. As Judge Bea explained in his dissent, the report leaves no doubt that the project "was meant to conserve *all* the water from the Cuyama River during the region's short rainy season for use during the long dry season by the residents, farms, and industries in the Santa Maria Basin. * * * None of it was to flow into the ocean." *Id.* at 21a (emphasis added).

The reservoir design was selected precisely because it would allow the Agencies "to conserve all the flood flows of the Cuyama River," except in "exceptionally high runoff years," thus providing "the maximum yield consistent with economical use of storage space." Pet. App. 229a-230a. In contrast, a design with a smaller capacity for water conservation was rejected because it would have allowed "much of the available runoff to escape to the ocean," *id.* at 229a, defeating the project's central water-conservation objective. Limiting releases of stored water to the downstream channel's percolation capacity achieves that objective by allowing for "maximum percolation into the ground-water basin." *Id.* at 228a. The Report accordingly allocated all of the reservoir's storage space to flood control or water conservation, *id.* at 225a, and Congress similarly appropriated funds for "conservation of water" and "flood control," Public Law 774, 68 Stat. 1190.

Public Law 774's reference to "other purposes" cannot be read to conflict with Twitchell Dam's main objectives of water conservation and flood control. Instead, read in its proper context, that language refers to various uses of the conserved water, including domestic, industrial, and municipal uses; arresting the increasing costs of groundwater pumping; and preventing salinity intrusion into the groundwater aquifer—all of which are included in the Secretary's Report. Pet. App. 208a-209a, 216a. Importantly, all of those uses depend on Twitchell Dam performing its water-conservation operations as described in the report: by limiting releases to the downstream river channel's percolation capacity

in order to maximize storage of diverted water in the groundwater aquifer. See *id.* at 228a.[3]

Further confirmation of those limits comes from the fact that the Secretary's Report specifically considered—and ultimately rejected—conservation measures (including regular water releases) for downstream steelhead, after consultation with FWS and CDFG. See Pet. App. 233a-241a, 246a-254a. By authorizing the project in accordance with the Secretary's agreement with those agencies' recommendations, Congress did not empower the Agencies to make additional releases for the benefit of downstream steelhead that conflict with those recommendations and the Secretary's detailed water-conservation plans for the project.

Congress's directive that the Agencies operate the project "substantially"—and not strictly—in accordance with the Secretary's Report, Public Law 774, 68 Stat. 1190, might give the Agencies some leeway to deviate from the approved project plans to further the project's water conservation or flood control purposes. But the statutory language cannot properly be read as

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[3] The specificity of Congress's direction regarding Twitchell Dam's water-conservation operations distinguishes Public Law 774 from other federal reclamation statutes that identify broad project goals without specifying how those goals are to be achieved. Under such statutes, federal agencies have discretion to develop operating plans that comply with the ESA, even though Congress may not have explicitly identified wildlife preservation as a project purpose. See, *e.g.*, *National Wildlife Fed'n* v. *National Marine Fisheries Serv.*, 524 F.3d 917, 928 (9th Cir. 2008) (agencies' operation of federal dams was subject to the ESA's requirements where the authorizing federal statute identified broad project goals, including "flood control, irrigation, and power production," but did not quantify those goals or "specif[y] the manner" in which the agencies had to achieve them).

granting the Agencies discretion to deviate from the specified release limit in a way that undermines the project's water-conservation purpose in pursuit of a different objective (maintaining steelhead runs) that was specifically rejected in the Secretary's Report. Cf. *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 671 (2007) (explaining that although the agency had to exercise judgment in determining whether the "enumerated statutory criteria" were met, the statute did not grant the agency "the discretion to add another entirely separate" criterion to the list).

In short, as Judge Bea explained in his dissent, an "action cannot substantially accord with a plan when the action both undermines the objectives specifically identified in the plan and, also, was considered and specifically rejected in the plan." Pet. App. 36a. The court of appeals' contrary interpretation of Public Law 774 is incorrect.

b. Because the Agencies lack discretion under Public Law 774 to send diverted water to the Pacific Ocean to facilitate steelhead migration, the Agencies are not legally responsible for any take allegedly resulting from the absence of such releases.

In prohibiting the take of a member of a listed species, Section 9 of the ESA incorporates "ordinary requirements of proximate causation and foreseeability." *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 700 n.13 (1995); see *id.* at 696 n.9. And, as this Court held in another context, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Department of Transp.* v.

Public Citizen, 541 U.S. 752, 770 (2004); see *Home Builders*, 551 U.S. at 667-668.

Here, because the Agencies lack discretion under Public Law 774 to make the additional water releases allegedly required to avoid take of steelhead, the Agencies are not the legally relevant cause of such take. The legally relevant cause instead is Congress's directive that the Agencies operate Twitchell Dam substantially in accordance with the Secretary's Report, which identifies the release limit as the central operating criterion governing the project's mandatory water conservation purpose. See *Public Citizen*, 541 U.S. at 769.

c. That the Agencies lack discretion under Public Law 774 to undertake the actions allegedly required to avoid take of steelhead does not create a conflict with ESA Section 9 that needs to be "harmonized," as the court of appeals mistakenly suggested. See Pet. App. 14a (citation omitted); see *id.* at 13a-18a. Section 9 prohibits take only when it is proximately caused by a "person," a term that is defined to include a federal agency, but not Congress. 16 U.S.C. 1532(13). Because the legally relevant cause of the dam's effect on steelhead migration is Public Law 774, that effect does not violate Section 9. As Judge Bea explained, "whether [Public Law] 774 grants or denies [d]efendants discretion to release water into the ocean for the fish, this case presents * * * no apparent inconsistency between federal laws to 'harmonize': either [d]efendants have discretion under [Public Law] 774 to operate the [d]am to avoid 'take' under the ESA, or they lack such discretion under [Public Law] 774 and therefore do not 'take' under the ESA." Pet. App. 46a.

In any event, even if there were an apparent conflict, the later-enacted ESA cannot be read to implicitly repeal or modify Public Law 774's directive that Twitchell Dam be operated substantially in accordance with the Secretary's Report. "While a later enacted statute (such as the ESA) can sometimes operate to amend or even repeal an earlier statutory provision * * * , repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Home Builders*, 551 U.S. at 662 (brackets, citation, and internal quotation marks omitted). Nothing in the ESA reveals any congressional intent to repeal or modify Public Law 774. And a statute like Public Law 774 "dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute" like the ESA "covering a more generalized spectrum." *Id.* at 663 (citation omitted).

2. Although the court of appeals' interpretation of Public Law 774 is erroneous, further review is not warranted at this time. The court of appeals' interpretation of that narrow provision does not involve a circuit conflict or present constitutional concerns, and there are unresolved issues that the court of appeals left for consideration on remand.

a. Petitioners do not identify a circuit split as to the meaning of Public Law 774; indeed, that statute has not been interpreted by any other federal court. Nor do petitioners point to any conflicting court of appeals decision involving a similarly worded statute. And because Public Law 774 applies exclusively to Twitchell Dam and Reservoir, the court of appeals' erroneous interpretation is unlikely to affect operations of other federal reclamation projects or apply in other contexts.

b. Petitioners nonetheless assert (Pet. 14-19, 21-23). that certiorari is warranted because the court of appeals' interpretation of Public Law 774 raises constitutional concerns. That is incorrect.

Contrary to petitioners' contention (Pet. 14-19, 21-23), the court of appeals' interpretation does not raise nondelegation concerns. The "constitutional question" under the nondelegation doctrine "is whether Congress has supplied an intelligible principle to guide the [Agencies'] use of discretion." *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019). Even if Congress's directive that Twitchell Dam be operated "substantially in accordance with" the Secretary's Report, Public Law 774, 68 Stat. 1190, means that the Agencies may "deviate slightly" from the specified release limit contained within the Secretary's report, Pet. App. 13a, the statute readily satisfies the "intelligible principle" standard, *Gundy*, 139 S. Ct. 2129. That standard is "not demanding," *ibid.*, and Congress "may confer substantial discretion on executive agencies to implement and enforce the laws" without raising nondelegation concerns, *id.* at 2123.

Petitioners also err in asserting (Pet. 23-34) that the court of appeals' decision raises important questions of federalism. In fact, the court specifically declined to reach the issues raised by petitioners relating to "the requirements under California water law," which also had not been raised or decided by the district court. The court of appeals instead left "those issues for consideration by the district court in the first instance." Pet. App. 19a-20a; see *id.* at 23a-24a n.3, 50a n.16. This Court should follow the same course. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (noting that this is a "court of review, not of first view").

c. The interlocutory posture of this case further counsels against the Court's review. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (noting that the interlocutory posture of a case "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari). Although petitioners are correct in noting (Pet. 7-9, 29-32) that the court of appeals' decision could require the modification of Twitchell Dam's operations to reduce the amount of water available to groundwater users in the Santa Maria River Valley, the extent of any potential reduction is uncertain at this point. The court declined to "reach the question of how the Agencies might be required to exercise their discretion" in order to avoid take of steelhead, and instead left that issue for resolution by the district court on remand. Pet. App. 19a-20a.[4]

Indeed, the sole question decided by the court of appeals was "whether, under [Public Law] 774, the Agencies have any discretion to release *any* amount of water from Twitchell Dam to avoid take of endangered Southern California Steelhead." Pet. App. 11a (emphasis added). In concluding that Public Law 774 granted the Agencies such discretion, the court assumed the truth of Coastkeeper's allegation that take could be avoided by "deviat[ing] slightly from the recommended flow rate at a few points throughout the year," *id.* at 13a, or by "provid[ing] modest releases at certain times of the

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[4] On July 28, 2023, Coastkeeper and the Bureau filed a stipulated motion in the district court to stay proceedings on remand to allow the Bureau to evaluate and implement supplemental flow releases, and to consult with the National Marine Fisheries Service under Section 7(a)(2) of the ESA regarding Twitchell Dam's potential effects on the steelhead. D. Ct. Doc. 154. The district court has not yet acted on the stipulated motion.

year and during certain water years," *id.* at 14a. The court's decision thus does not preclude petitioners or the Bureau from arguing that Public Law 774 prohibits more significant modifications of Twitchell Dam's water-conservation operations. Because that argument remains available if the extent of additional releases required to avoid take is greater than the court of appeals anticipated, further review is not warranted at this time. Cf. *Mount Soledad Memorial Ass'n* v. *Trunk*, 567 U.S. 944 (2012) (statement of Alito, J., respecting the denial of the petitions for writs of certiorari) (agreeing with denial of certiorari where "no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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