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Case No. S290840

IN THE SUPREME COURT OF CALIFORNIA

BRING BACK THE KERN, et al.

Plaintiffs and Respondents,

v.

CITY OF BAKERSFIELD,

Defendant and Respondent.

NORTH KERN WATER STORAGE DISTRICT, et al.

Real Parties in Interest and Appellants.

After a Decision by the Court of Appeal, Fifth Appellate District
Case No. F087487 (and consolidated cases)

Appeals from Orders Granting a Preliminary Injunction
in Favor of Plaintiffs
Kern County Superior Court Case No. BCV-22-103220
The Honorable Gregory A. Pulskamp, Judge Presiding

BRIEF OF *AMICI CURIAE* CALIFORNIA TROUT, FRIENDS OF THE RIVER, MONO LAKE COMMITTEE, NATURAL RESOURCES DEFENSE COUNCIL, AND PUTAH CREEK COUNCIL IN SUPPORT OF PLAINTIFFS AND RESPONDENTS

Filed concurrently with Application for Leave to File *Amici Curiae* Brief

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under Rules 8.488 and 8.208 of the California Rules of Court.

DATED: May 1, 2026 /s/ *Matthew J. Sanders*
Matthew J. Sanders

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INTRODUCTION

In 1860, panning for gold, German pioneer Christian Bonha decided he had found his little slice of California. Bonha built a thatched-roof house and founded the town of Kern Island. Born in and of the Kern River, the town grew over the following decade as canals and irrigation created arable land, including Christian Bonha's corn fields, later purchased by one Colonel Thomas Baker.

One hundred fifty years hence, Kern Island is now Bakersfield, and the Kern River has all but vanished. In most of Bakersfield, during most of the year, and almost every year, the Kern River is completely dry. *Bring Back the Kern v. City of Bakersfield*, 110 Cal. App. 5th 322, 338 (2025) ("*BBTK*"). For millennia the River flowed unobstructed, originating on the slopes of Mount Whitney and moving through the lands of the Tübatulabal and Kawaiisu peoples, sustaining an entire watershed and countless ecosystems.

Neither those peoples nor Christian Bonha nor Colonel Baker would recognize the Kern River today. Bakersfield has become the principal metropolis of the southern Central Valley, but its wildlife and people can no longer make use of the Kern River's ecological or recreational benefits. More than a half dozen dams and weirs, built throughout the second half of the twentieth century, divert water for agriculture and domestic use and, in some places, convert public surface flows into privatized groundwater. *See* Appellants' Appendix, Court of Appeal ("AA") 12:2773-74. Today the Kern River below the McClung Weir lacks even the small amount of water necessary to keep fish alive or

support the River's many other beneficial uses. AA12:2587; *see BBTK*, 110 Cal. App. 5th at 338. Even when the River's flows rise during wet years, any fish that return merely die off again afterwards. For instance, after the Court of Appeal issued its decision in this case last year, dam operators promptly cut off the flows the trial court had ordered restored. Observers subsequently documented the deaths of thousands of fish, including native Sacramento suckers and non-native bass, sunfish, bullhead catfish, and mosquitofish. *See infra* at 55.

With Section 5937 of the Fish & Game Code ("Section 5937"), the California Legislature has created a mandate—and a tool—to protect fish and rivers across California, including the Kern River. Section 5937 requires in relevant part that "[t]he owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam." Cal. Fish & Game Code § 5937 ("§ 5937"). Put simply, Section 5937 requires dam owners to maintain instream flows sufficient to support below-dam fish. Section 5937 has operated across California—including through cases brought by *amici curiae* ("*Amici*") in this case—to restore instream flows, yielding profound benefits for fish, wildlife, rivers, watersheds, and entire ecosystems, with relatively little impact on other important uses of water. The trial court properly recognized Section 5937's compulsory role in doing the same for the Kern River.

Section 5937 operates alongside Article X, Section 2 of the California Constitution ("Section 2"), which prohibits "the waste or unreasonable use or unreasonable method of use of water or unreasonable method of diversion of water." Cal. Const. art. X, § 2. Section 2 is "self-executing" and expressly empowers the Legislature to "enact laws in the furtherance of the policy in this section contained." *Id.* Section 2's self-executing nature ensures that water uses are not manifestly unreasonable. Courts must defer to legislative reasonableness determinations, including Section 5937. Yet in its decision reversing the trial court, the Court of Appeal reads Section 2's self-executing provision as requiring judges to conduct ad-hoc balancing of the reasonableness of any water use—even where the Legislature has already made that reasonableness judgment through a duly-adopted statute like Section 5937. The Court of Appeal's interpretation runs counter to Section 5937's purpose, legislative history, and precedent, as well as the plain meaning and previous applications of Section 2.

In this brief, *Amici* provide background on how they have sued to enforce Section 5937 to protect fish and flows across California. The brief then makes three connected points.

First, Section 5937 reflects the Legislature's codification of Section 2's "reasonableness" requirement that courts should follow (subject, of course, to properly pleaded and supported "manifestly unreasonable" constitutionality challenges).

Second, the Court of Appeal misunderstands Section 2's self-executing provision, whose meaning and operation is made

plain by California constitutional law and Section 2 precedent (and discussed briefly above and more fully below).

Finally, the Court of Appeal's decision, if it were affirmed, would impede California's water-law system and threaten California's fish and rivers. On the other hand, a decision in favor of Petitioners and Respondents Bring Back the Kern, et al. ("Bring Back the Kern") would respect the Legislature's role in setting state water policy, positively impact fish and the Kern River more generally, and do so without unduly impairing other important uses of water.

For these reasons, and the reasons set forth in Bring Back the Kern's opening and reply briefs, this Court should reverse the Court of Appeal and remand the case for further proceedings.

BACKGROUND

I. *Amici Curiae*[1]

Amicus California Trout ("CalTrout") is a nonprofit conservation organization active since the early 1970s working to ensure healthy waters and resilient wild fish for a better California. CalTrout was the lead plaintiff in *CalTrout I* (*Cal. Trout, Inc. v. State Water Res. Control Bd.*, 207 Cal. App. 3d 585 (1989)) and *CalTrout II* (*Cal. Trout, Inc. v. Superior Ct.*, 218 Cal. App. 3d 187 (1990)). Those cases successfully employed Fish & Game Code Section 5946, which requires the application of Section 5937 to water-rights permits, to ensure water releases for

[1] Pursuant to California Rule of Court 8.520(f)(4), *Amici* certify that no party or its counsel authored this brief in whole or in part and no party, counsel, or other person made a monetary contribution intended to fund its preparation or submission.

fish in the Mono Lake tributary streams. *Id.* These cases established precedent-setting legal victories that revived enforcement of Section 5937 statewide.

Friends of the River is a statewide California river conservation organization dedicated to preserving and restoring rivers and watersheds, as well as advocating for sustainable water management. Founded in 1973 to advocate for the protection of the Stanislaus River, Friends of the River has been involved in water-rights litigation and river-protection campaigns throughout California ever since, including Section 5937 enforcement efforts to protect fish habitat below dams.

Mono Lake Committee is a nonprofit citizens' group dedicated to protecting and restoring the Mono Basin ecosystem, educating the public about Mono Lake and the impacts of excessive water use, and promoting cooperative solutions. In 1979, the Mono Lake Committee, National Audubon Society, Mono Basin landowners, and other plaintiffs sued the Los Angeles Department of Water and Power ("L.A. Water and Power") to restore Mono Lake and four tributaries from the damage of excessive water diversions. *See Nat'l Audubon Soc'y v. Superior Ct.*, 33 Cal. 3d 419, 424 (1983) ("*National Audubon*"). In 1985, CalTrout formally joined this coalition's legal push to reverse the severe environmental consequences to Mono Lake from L.A. Water and Power's diversions, and restore stream flows to four creeks tributary to Mono Lake. *See* State Water Res. Control Bd., City of Los Angeles' Water Right Licenses for

Diversion of Water from Streams Tributary to Mono Lake, No. 1631, 1994 WL 16804395, at 4 ("Decision 1631").

The Natural Resources Defense Council ("NRDC") is an international environmental advocacy group. NRDC's California water team led an eighteen-year lawsuit against the U.S. Bureau of Reclamation, initiated in 1988, arguing that the operation of Friant Dam on the San Joaquin River violated Section 5937 by failing to release sufficient water to keep fish in good condition. Nathan Matthews, *Rewatering the San Joaquin River: A Summary of the Friant Dam Litigation*, 34 Ecology L.Q. 1109, 1110 (2007). The NRDC case resulted in a 2006 settlement that restored flows to the upper San Joaquin River to reestablish spring-run Chinook salmon that had been extirpated by 1949. *Id.* at 1115, 1130-31.

The Putah Creek Council protects and enhances Putah Creek, which drains from the east side of the Coast Range into the Sacramento-San Joaquin Bay-Delta Estuary. In a decade-long lawsuit filed in 1990 against the Solano County Water Agency and other Solano County water users, the Putah Creek Council successfully argued that Solano water diversions violated Section 5937, resulting in a settlement in 2000 that established permanent environmental flows for the twenty-three miles of lower Putah Creek and provided permanent restoration funding. Sylvia Wright, *Settlement Reached in Long-running Putah Creek Water Dispute*, U.C. Davis News (May 24, 2000);[2] *Putah Creek*

[2] https://www.ucdavis.edu/news/settlement-reached-long-running-putah-creek-water-dispute.

Council v. Solano Irrigation Dist., Sacramento Superior Court No. 515766, at *5 (2000); *see generally* Settlement Agreement and Stipulation, *Putah Creek Council v. Solano Irrigation Dist.*, Nos. 3 Civil C025527 & C025791 (Cal. Ct. App. May 23, 2000).

II. A brief history of Section 5937

Section 5937 is part of California's current statutory protections for fish, and it builds upon continuous actions the Legislature has taken to protect fish since the 1850s. *See, e.g.*, 1852 Cal. Comp. Laws 62.[3] In keeping with this tradition, in 1915, the Legislature codified what would later become Section 5937. Stats. 1915, ch. 491, § 1, p. 820.[4] This early version of the law required dam owners to "allow sufficient water at all times to pass through such fishway to keep in good condition any fish that may be planted or exist below said dam . . . ." *Id*. In 1937, a few years after the Legislature recodified the law as a part of the Fish & Game Code, concern over the impact of the Shasta Dam on fish in Moccasin Creek galvanized further legislative action. Karrigan S. Börk et al., *The Rebirth of California Fish & Game Code Section 5937: Water for Fish*, 45 U.C. Davis L. Rev. 809, 839-40 (2012). The Legislature accordingly amended Section 5937 to mandate the release of water for fish "in the absence of a fishway." § 5937. In the following decades the Legislature continued to pass additional laws to protect fish in streams and rivers. *See generally* Börk, 45 U.C. Davis L. Rev. at 848-49

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[3] https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1852/1852.PDF#page=13.

[4] https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1915/15Vol1_Chapters.pdf.

(listing various legislative actions taken in the 1950s, 60s, and 70s to protect fish).

Despite its textual clarity, Section 5937 has not been consistently enforced by the state. California water law was developing rapidly throughout the early and mid-twentieth century, and Section 5937 was at times overlooked as California's population and demand for water soared. *See id.* at 814. Starting in the 1980s, however, community and environmental groups, including *Amici*, began seeking enforcement of Section 5937, alongside the State Water Resources Control Board ("State Water Board"). That enforcement, and the plain-text interpretation of Section 5937 urged by Bring Back the Kern in this case, have been crucial to protecting fish and rivers across the state.

Section 5937 and the public trust doctrine have gone hand in hand in protecting California's fish and rivers. This Court's ruling in *National Audubon* confirmed that the public trust doctrine protects fisheries and other ecological resources of navigable waters and their tributaries. 33 Cal. 3d at 435; *see also CalTrout I*, 207 Cal. App. 3d at 626, 629-30 (discussing legislative expressions of the public trust doctrine protecting fisheries); Börk, 45 U.C. Davis L. Rev. at 855-65 (discussing Section 5937 as an implementation of public trust principles). In keeping with judicial recognition of the doctrine, the Legislature has repeatedly codified specific public trust obligations and management structures.[5]

[5] In addition to Sections 5937 and 5946, many other California statutory provisions protect public trust resources. *See,*

III. *Amici* have successfully brought suit under Section 5937 to protect fish and rivers across California.

A. Section 5937 restored flows and protected fish in the Mono Basin (Mono Lake Committee and CalTrout).

In 1941, Los Angeles began diverting water from streams feeding Mono Lake, an ancient saline lake in California's Eastern Sierra. *CalTrout I*, 207 Cal. App. 3d at 596-97. L.A. Water and Power constructed an aqueduct system that diverted nearly all water from Rush, Lee Vining, Parker, and Walker Creeks for delivery to Los Angeles. *Id.* at 598. Over the following decades, Mono Lake's water level dropped approximately forty-five feet, doubling its salinity and devastating the tributary streams' fisheries. Decision 1631, at 5 (lake level), 21-76 (fisheries), 80 (salinity). Diversion structures owned or operated by L.A. Water and Power, such as Grant Lake Dam on Rush Creek, were blocking nearly all water from reaching downstream habitats. *See generally* John Hart, *Storm over Mono* (1996) (describing the

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e.g., Water Code §§ 85023 (declaring that the public trust doctrine and reasonable use underlie state water management policy, especially in the Delta), 85086 (State Water Board to establish flow criteria for the Delta and its tributaries to protect public trust resources); Pub. Res. Code §§ 6009 (California holds tidelands, submerged lands, and beds of navigable waters in trust for statewide public purposes, including fisheries), 30519(b) (Coastal Commission retains the authority to review new development in the coastal zone for consistency with public trust obligations).

ecological impact on Mono Lake of water diversions and the subsequent legal actions).

In the early 1980s, the Mono Lake Committee, National Audubon Society, and CalTrout joined to challenge L.A. Water and Power's diversions using Section 5937 as applied through Fish & Game Code Section 5946.[6] Mono Lake Committee and CalTrout scientists documented how trout populations had collapsed due to insufficient below-dam flows, which led to reduced spawning habitat, elevated water temperatures, and loss of riparian vegetation. *Mono Lake Basin Creeks*, California Trout;[7] *Mono Basin Streams*, Mono Lake Committee.[8]

The resulting decisions by the Third District Court of Appeal became known as the *CalTrout I* and *CalTrout II* cases cited above. These cases affirmed Section 5946 and Section 5937's requirements of water sufficient to keep fish "in good condition." *See generally CalTrout I*, 207 Cal. App. 3d 585; *CalTrout II*, 218 Cal. App. 3d 187; *see also* Börk, 45 U.C. Davis L. Rev. at 885.

As described above, this Court detailed in *National Audubon* the breadth of Section 2's reasonableness requirement, clarifying that such uses included "recreation and preservation and enhancement of fish." 33 Cal. 3d at 434. This seminal

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[6] Section 5946 complements Section 5937 by prohibiting water diversions from the Mono Basin harmful to fish absent "full compliance with Section 5937." Fish & Game Code § 5946(b)-(c).

[7] https://caltrout.org/regions/sierra-headwaters-region/mono-lake-basin-creeks (last visited Apr. 29, 2026).

[8] https://www.monolake.org/whatwedo/restoration/streams (last visited Apr. 29, 2026).

decision applying the public trust doctrine to Mono Lake's ecological resources set in motion the process to raise the Lake's level with water inflows above those required by Section 5937. Greg Reis, *Estimating the "water cost" of implementing releases from Mono Basin streams to meet the Stream Ecosystem Flow (SEF) requirements of Water Rights Order 2021-86* (Mar. 26, 2026) (explaining that water required for Mono Lake level, on average, exceeds required Section 5937 releases);[9] *see generally* Decision 1631 (application of *National Audubon* decision to water rights licenses). *National Audubon* also elucidated that the public trust doctrine applies to navigable waters and their tributaries, providing an unassailable legal foundation for protecting Mono Lake's ecological splendor. 33 Cal. 3d at 426 (holding that the public trust doctrine applies to navigable waters and their tributaries and bars any party from claiming a vested right to divert waters where such diversions harm public trust interests).

Finally, in 1994, to formally curtail L.A. Water and Power's diversions based on the successful *National Audubon* and *CalTrout I* and *II* cases, the State Water Board issued Decision 1631. The decision established specific minimum stream flows for the four tributaries based on Section 5937. Decision 1631, at 21-77.

This Court's *National Audubon* decision, and the *CalTrout I and CalTrout II* rulings and Decision 1631, ensure that Section 5937 provides enforceable standards limiting water diversions.

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[9] https://www.monobasinresearch.org/onlinereports/monolake5937watercost.pdf.

Combined with the public trust doctrine, the Mono Lake Committee and CalTrout's use of Section 5937 transformed California water law and established that environmental values must be balanced against consumptive water uses.

B. Section 5937 increased flows and protected fish in Putah Creek (Putah Creek Council, University of California, and City of Davis).

In 1957, the U.S. Bureau of Reclamation completed Monticello Dam on Putah Creek, creating Lake Berryessa to store and divert water for Solano County agriculture and municipal uses. *Solano Project*, U.S. Bureau of Reclamation.[10] For decades following the dam's completion, the Bureau released minimal water into Putah Creek, dramatically reducing flows and in-stream fish habitat. Peter B. Moyle et al., *Fish Health and Diversity: Justifying Flows for a California Stream*, Fisheries 6, 10 (Jan. 9, 2011). Pre-Monticello Dam flows had supported a unique assemblage of co-evolved Central Valley native fish, including fall-run Chinook salmon and steelhead trout. *Id.* Following the dam's construction, Putah Creek's below-dam riparian corridor withered, water temperatures soared during the summer months, and native fish species including rainbow trout, Sacramento sucker, and Sacramento pikeminnow declined dramatically. *Id.* at 10-12; *see also* Börk, 45 U.C. Davis L. Rev. at 839-40.

In 1991, the Putah Creek Council filed a lawsuit against the Solano County Water Agency and other water users in Solano

[10] https://www.usbr.gov/projects/index.php?id=421 (last visited Apr. 27, 2026).

County under Section 5937. *Our History*, Putah Creek Council.[11] The University of California and the City of Davis joined the litigation as plaintiffs in 1993, recognizing Putah Creek's importance as an ecological, research, and recreational resource. *Id.* The plaintiffs argued that the Solano Project violated Section 5937 by releasing inadequate flows to maintain fish "in good condition." *Putah Creek Council v. Solano Irrigation Dist.*, Sacramento Superior Ct. No. 515766 (2000). The plaintiffs, bolstered primarily by U.C. Davis fisheries research, documented how these bare-minimum releases created lethal conditions for fish. Moyle et al., *Fish Health and Diversity* at 10-12. Inadequate flows fragmented the stream into shallow, isolated pools that dried up or became overheated, decimating native trout and other indigenous fish populations. *Id.*

In 1996, the trial court acknowledged that Section 5937 obligated the Solano water agencies to maintain Putah Creek's below-dam fish in good condition. *Our History*, Putah Creek Council. The court granted the plaintiffs some, but not all, of the water sought for the Creek's fishery. *Id.* The Solano parties appealed. *Id.* In 2000, the parties reached a settlement known as the Putah Creek Accord. Settlement Agreement and Stipulation, *Putah Creek Council*, Nos. 3 Civil C025527 & C025791 (Cal. Ct. App. May 23, 2000). The Solano parties agreed to increase below-dam flows for Putah Creek to maintain a continuous flow of water to the Sacramento-San Joaquin Bay-Delta Estuary, ensure

[11] https://putahcreekcouncil.org/who-we-are/our-history/ (last visited Apr. 27, 2026).

low temperatures required for native fish health, and provide attraction and rearing flows each fall for Chinook salmon. *Id.*

The Putah Creek case demonstrated that restoring the flows required by Section 5937 could result in dramatic ecological recovery, with native fish populations rebounding and riparian forests regenerating. Andrew Rypel et al., *Putah Creek's Rebirth: A Model for Reconciling Other Degraded Streams?*, California WaterBlog (July 8, 2023).[12] The Putah Creek case also demonstrated how Section 5937 can bring together local watershed groups and institutional partners like the University of California and a city to achieve meaningful stream restoration.

C. Section 5937 applied to a federal dam to restore the San Joaquin River (NRDC and Friends of the River).

In 1942, the U.S. Bureau of Reclamation completed Friant Dam on the San Joaquin River northeast of Fresno. *History*, Friant Water Authority.[13] Friant Dam creates the Millerton Reservoir and diverts most of the San Joaquin River's flows into two major canals that irrigate Central Valley farmland. *Id.* For over five decades, these diversions desiccated a sixty-mile stretch of the San Joaquin River below the dam except during flood releases, extirpating "one of the largest Chinook runs anywhere on the Pacific Coast[,] . . . estimated at several hundred thousand

[12] https://californiawaterblog.com/2023/07/08/putah-creeks-rebirth-a-model-for-reconciling-other-degraded-streams/.

[13] https://friantwater.org/history (last visited Apr. 27, 2026).

fish." *NRDC v. Patterson*, 333 F. Supp. 2d 906, 909 (E.D. Cal. 2004); *see generally* Matthews, 34 Ecology L.Q. 1109.

In 1988, NRDC, ultimately joined by twelve other advocacy groups, including Friends of the River, sued the Bureau of Reclamation and various water users. *See NRDC v. Patterson,* 791 F. Supp. 1425 (E.D. Cal. 1992) ("*Patterson I*"); *NRDC v. Patterson*, 333 F. Supp. 2d 906 (E.D. Cal. 2004) ("*Patterson II*"). In their suit, NRDC and Friends of the River argued that the Bureau, as Friant Dam's owner, was in violation of Section 5937. *Patterson II*, 333 F. Supp. 2d at 909-10. They contended in essence that the Bureau had an ongoing obligation under Section 5937 to release flows adequate to support the below-dam fish that existed at the time Friant Dam began operation. *Id.* at 925.

The plaintiff groups contributed crucial documentation of the San Joaquin River's ecological collapse. They compiled historical records showing the River's former abundance, including accounts of impressive salmon runs that had supported both Native American communities and commercial fisheries. Matthews, 34 Ecology L.Q. at 1114. NRDC, Friends of the River, and other plaintiffs documented how flow diversions had eliminated riparian habitat, raised water temperatures to lethal levels during summer months, and destroyed the connected aquatic ecosystem that once extended from the Sierra Nevada headwaters to the Sacramento-San Joaquin Bay-Delta Estuary. *Id.* at 1113-14. The Bureau of Reclamation and water users argued that Section 5937 required only maintaining some fish populations, not restoring extirpated species, and that federal

water project operations were exempt from state law in any event. *Id*. at 1122-24; *see also NRDC v. Houston*, 146 F.3d 1118, 1131-32 (9th Cir. 1998).

In 2006, after eighteen years of litigation, including the district court's ruling on summary judgment that the Bureau was liable for violating Section 5937, *see Patterson II*, 333 F. Supp. 2d at 925, the parties reached a settlement, *see generally* Stipulation of Settlement, *NRDC, et al. v. Rodgers, et al.*, No. CIV S-88-1658 (E.D. Cal. Sept. 13, 2006, *approved* Oct. 23, 2006). The settlement recognized the district court's ruling and required the Bureau to release flows specifically designed to restore and maintain fish populations, including the reintroduction of spring-run Chinook salmon. *Id.* ¶¶ 1 (the "Court has issued Orders with respect to issues of liability . . . for violations of California Fish and Game Code § 5937"), 13 (flows), 14 (reintroduction of salmonids). The San Joaquin River settlement demonstrated Section 5937's value in securing water and needed restoration for a historic California fishery.

ARGUMENT

Amici make three arguments in support of Bring Back the Kern and the trial court's decision.

First, Section 5937 is a legislative codification of Section 2's "reasonableness" requirement. That codification enables courts to enforce Section 2 without getting bogged down in case-by-case determinations of what constitutes "reasonable" water use.

Second, the Court of Appeal misunderstands the effect of Section 2's self-executing provision, as evidenced by California constitutional law and relevant precedent. Section 2 empowers

the Legislature to enact laws that define the "reasonable" use of water, of which Section 5937 is one, and Section 2's "self-execution" empowers courts to ensure that water uses are not "manifestly unreasonable." *CalTrout I*, 207 Cal. App. 3d at 625.

Third, affirming the Court of Appeal would impede California's water-law system and endanger California's fish and rivers. In contrast, a decision in favor of Bring Back the Kern would respect the Legislature's and judiciary's respective roles in setting state water policy and positively impact fish and streams throughout California, while still protecting other important water uses.

I. Section 5937 is a legislative determination of "reasonableness" under Section 2.

The Court of Appeal recognizes in its decision that, "[w]hen a statute requires a particular water use or allocation, the terms of the statute dictate the outcome unless section 2 requires otherwise." *BBTK*, 110 Cal. App. 5th at 351. The Court therefore acknowledges both that the Legislature has primacy in effectuating Section 2 and that Section 2 imposes only a "modest" limit on the Legislature's power. *Id.*

Yet the Court of Appeal reverses the trial court, in part, for "applying only the terms of section 5937 without giving direct effect to the reasonableness provisions of section 2." *Id.* at 356. To give such "direct effect," the Court holds, "a court must always consider reasonableness whenever it would direct or adjudicate a particular use of water, even when applying statutes that do not

expressly incorporate a reasonableness determination." *Id.* at 351; *see also id.* at 356.

The Court of Appeal misapprehends the relationship between Section 5937 and Section 2, and therefore what Section 5937 fundamentally is. In passing, codifying, recodifying, and expanding Section 5937 over a period of more than twenty years, the Legislature has already determined that requiring sufficient instream flows to keep below-dam fish "in good condition" is "reasonable" within the meaning of Section 2. *See* Bring Back the Kern Opening Brief at 35-38 (describing Section 5937's legislative history). As the trial court correctly recognized, "Section 5937 was deliberately adopted by the State Legislature after balancing the competing uses of water and is enforceable as a legislative mandate." AA12:2781; *see also* Bring Back the Kern Opening Brief at 50-52 (arguing that Section 5937 was enacted in furtherance of Section 2). The trial court recognized the Legislature's important role in setting water policy, and that the hard work of balancing reasonableness, at least as to below-dam fish, has already been done. As for the courts, they need only ensure that the flows required by Section 5937 are not a manifestly unreasonable use of water, should a diverter properly plead a constitutional challenge and present sufficient evidence that it is.

A. The Legislature has effectuated Section 2 through multiple statutes, including Section 5937.

Section 2 "establishes state water policy." *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 706 (1933); *see also Superior*

Ct. v. Cnty. of Mendocino, 13 Cal. 4th 45, 53 (1996) (discussing the "constitutional prohibition" against unreasonable uses of water); *Nat'l Audubon Soc'y*, 33 Cal. 3d at 443 (recognizing that Section 2 "establishes state water policy" that "[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use"); *see also Stanford Vina Ranch Irrigation Co. v. State*, 50 Cal. App. 5th 976, 999 (2020) ("[T]his constitutional provision sets forth 'the overriding principle governing the use of water in California.'") (quoting *People ex rel. State Water Res. Control Bd. v. Forni*, 54 Cal. App. 3d 743, 750 (1976)).

But Section 2 does not work alone. It expressly empowers the Legislature to "enact laws in the furtherance of the policy in this section . . . ." Cal. Const. art. X, § 2. That legislative power is the power to set state water policy, and it is sweeping. *See Santa Ana Hosp. Med. Ctr. v. Belshe*, 56 Cal. App. 4th 819, 836 (1997) ("It is for the Legislature to make public policy."); *Yosemite Lumber Co. v. Indus. Acc. Comm'n of Cal.*, 187 Cal. 774, 780 (1922) ("If the Legislature has power to do a certain thing, its power to do it is always plenary."); *see also Gin S. Chow*, 217 Cal. at 706 (observing that state policy "can be ascertained only by reference to the constitution and laws passed under it").

Pursuant to its plenary authority to set state water policy, the Legislature has adopted many statutes to effectuate Section 2. Bring Back the Kern identifies four: Water Code §§ 370, 13550, 13553, 32601. Bring Back the Kern Opening Brief at 60-61. There are many others:

- Water Code Section 1050, which declares the State Water Board's fundamental purpose to be "in furtherance of the policy contained in Section 2 of Article X of the California Constitution." Water Code § 1050.
- An entire article of the Water Code that is dedicated to enumerating beneficial uses of water, including "the use of water for recreation and the preservation of fish." *Id.* div. 2, pt. 2, ch. 1, art. 4; *id.* § 1243.
- Water Code Section 1244, which provides what can be evidence of an unreasonable use of water before the State Water Board. *Id.* § 1244.
- California's Wild and Scenic Rivers Act, which preserves "certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values," because "such use of these rivers . . . is a reasonable and beneficial use of water within the meaning of Section 2 of Article X of the California Constitution." Pub. Res. Code § 5093.50.
- Public Resources Code Sections 5093.542(a) and 5093.70(a)(2), which declare that maintaining free-flowing conditions in the McCloud River and Mill and Deer Creeks to protect fisheries is reasonable. *Id.* §§ 5093.542(a), 5093.70(a)(2).

Some of these laws expressly implement Section 2, while others implicitly do so. *Cf. CalTrout I*, 207 Cal. App. 3d at 624-25 (upholding Section 5946 as a valid enactment of the Legislature's authority "to enact statutes which determine the reasonable uses of water"). Indeed, because Section 2 requires that water uses be

reasonable, every law regarding water uses is arguably a legislative determination of reasonableness.[14] *See Nat'l Audubon Soc'y*, 33 Cal. 3d at 443 (Section 2 mandates that "[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use"). These laws' Section 2-effectuating character does not depend, as the Court of Appeal holds, on whether they "expressly incorporate a reasonableness determination." *BBTK*, 110 Cal. App. 5th at 351.

Which brings us to the statute at issue in this case, Section 5937. Like the laws discussed above, Section 5937 effectuates

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[14] The State Water Board also regularly makes Section 2 reasonableness determinations through its "exercise [of] the adjudicatory and regulatory functions of the state in the field of water resources." Water Code § 174. In so doing, the State Water Board exercises by delegation the same power the Legislature does—to act "in furtherance of the policy contained in Section 2 of Article X." *Id.* § 1050; *see also In re Waters of Long Valley Creek Stream Sys.*, 25 Cal. 3d 339, 354 (1979) (recognizing that the Legislature has granted the State Water Board authority to "enact laws in the furtherance of the constitutionally expressed state water policy").

The State Water Board also has adopted regulations to implement Section 2. *See Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1485 (2014), *as modified on denial of reh'g* (July 11, 2014) (recognizing that the Board's regulatory authority "necessarily includes the power to enact regulations governing the reasonable use of water"). Dozens of these regulations explicitly reference Section 2. *See, e.g.*, 23 Cal. Code Regs. §§ 731 (applications for water where an existing right is claimed), 875.1 (non-consumptive uses), 966 (urban water use objectives); *see also* Gov't Code § 11349(e) ("'Reference' means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.").

Section 2. That is, Section 5937 is the Legislature's view of what constitutes a reasonable use of water with respect to below-dam fish. That view, enshrined as a mandate, is that "[t]he owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that many be planted or exist below the dam." § 5937; *see also* Bring Back the Kern Opening Brief at 50-54 (echoing this argument).

Notably, Section 5937's "good condition" requirement is a compromise that reflects the Legislature's balancing of competing water uses. The statute does not require "perfect" or "near-perfect" condition—only "good condition." § 5937. Section 5937 is also a compromise in that it extends protections to only below-dam fish, not above-dam fish. *Id.*

In short, in enacting Section 5937, the Legislature has already conducted the requisite balancing and concluded that maintaining in-stream flows for fish to remain "in good condition" below dams is a reasonable use of water. Such balancing satisfies Section 2's requirement that all uses of water be reasonable. *Nat'l Audubon Soc'y*, 33 Cal. 3d at 443. With this mandate fulfilled, courts should defer to the Legislature's finding of reasonableness.

To be clear, the courts still play an important role under Section 2. In any given case enforcing Section 5937, they may evaluate whether the Legislature's finding of reasonableness as to a particular water allocation is "manifestly unreasonable," should a diverter properly plead a constitutional challenge and

present sufficient evidence that it is. *CalTrout I*, 207 Cal. App. 3d at 625. But this narrow judicial role is not "[a]n invitation to substitute the policy view of a court in this circumstance for a reasonable policy enacted in a statute" like Section 5937. *Id.* Indeed, the courts *may not* engage in a wide-ranging reassessment of the reasonable-use question settled by Section 5937 without violating separation-of-powers principles. *See Los Angeles Cnty. Metro. Transp. Auth. v. Alameda Produce Mkt., LLC*, 52 Cal. 4th 1100, 1114 (2011) (holding that the separation of powers "requires [courts] to 'follow the public policy choices actually discernible from the Legislature's statutory enactments'") (quoting *Cal. Teachers Ass'n v. Governing Bd. of Rialto Unified Sch. Dist.*, 14 Cal. 4th 627, 651 (1997)). Because state water policy is primarily the Legislature's domain, there is a high bar for disturbing the Legislature's enactments—*CalTrout I*'s "manifestly unreasonable" standard. 207 Cal. App. 3d at 625. Thus, courts should not second-guess legislatively required water allocations that fall within the broad range of reasonable uses, like Section 5937.

B. Section 2's history reveals the intentional vesting of legislative power to set state water policy, including by determining which uses of water are "reasonable."

As this Court well knows, California water law is a complex mix of riparian and appropriative doctrine. *Nat'l Audubon Soc'y*, 33 Cal. 3d at 441. Landowners hold riparian rights to watercourses abutting their land, whereas anyone may claim a first-in-time appropriation for putting water to use. *Id.* This dual system of water rights originated in common law, and the

Legislature created procedures for establishing appropriative rights. *Id.* at 441-42. In this way, both the judiciary and the Legislature played important roles in shaping and enforcing early California water law.

This Court's 1926 decision in *Herminghaus v. South California Edison Company*, 200 Cal. 81 (1926), temporarily brought these roles into question. *Herminghaus* held that riparian rights, unlike appropriative rights, were unconstrained by the doctrine of reasonable use and therefore did not have to be reasonable. *Id.* at 101-02; *see also Nat'l Audubon Soc'y*, 33 Cal. 3d at 442 (discussing this aspect of *Herminghaus*). The result was that the power to set state water policy shifted toward the courts and away from the Legislature. *See* Ryan Bezerra, California Water Law 185 (2022) ("*Herminghaus* was a temporary triumph . . . for the court-driven method for making water law. It was perhaps the California courts' most aggressive assertion of authority to make water law themselves.").

Displeased with this result, in 1928 the Legislature proposed—and the electorate approved—Section 2 (originally adopted as Article XIV, Section 3). *See Light*, 226 Cal. App. 4th at 1479; *Nat'l Audubon Soc'y*, 33 Cal. 3d at 443. In requiring that all uses of water be reasonable, Section 2 overturned *Herminghaus* and empowered the Legislature to "enact laws in the furtherance of the policy in this section . . . ." Cal. Const. art. X, § 2; *CalTrout I*, 207 Cal. App. 3d at 625 (recognizing that Section 2 was "enacted to vest the 'right' in the Legislature, over the judicial objection in *Herminghaus*, to determine the useful and

beneficial purposes of water use"). As discussed above, "laws in furtherance of the policy of" Section 2 necessarily included laws that determine which uses of water are "reasonable." *See supra* at 32-37.

The Court of Appeal's alternative reading of Section 2, which would require judges to make independent determinations of reasonableness without regard to the Legislature having already done so, impermissibly ignores this history. *BBTK*, 110 Cal. App. 5th at 356. Specifically, that reading vests courts, rather than the Legislature, with the authority to set state water policy, even though Section 2 was specifically designed and approved to do just the opposite.

Real Parties similarly ignore Section 2's history. They cite two historical events to support the Court of Appeal's reading of Section 2 and counter, in their words, "extreme deference" by the judiciary to the Legislature. *See* Real Parties in Interest Answer Brief on the Merits at 65-66 (citing Bring Back the Kern Opening Brief at 11) ("Real Parties Brief"). Real Parties point first to an early draft of Section 2 that contained a broader grant of authority to the Legislature than the version of Section 2 that was ultimately approved. *Id.* (citing Real Parties Motion for Judicial Notice Ex. B3-B5, B11, Vol. 1, p. 81-86, 145) ("The original draft gave the Legislature broad authority, but that language was replaced by the much narrower in-furtherance clause.").

Two principles of statutory interpretation stand in Real Parties' way. *See In re Gadlin*, 10 Cal. 5th 915, 927 (2020)

(explaining that typical principles of statutory interpretation apply when interpreting voter-enacted constitutional provisions). The first principle is that a "former version of a bill which differs significantly from the version which is enacted is of little value on the issue of legislative intent." *Samantha C. v. State Dep't of Developmental Servs.*, 185 Cal. App. 4th 1462, 1489-90 (2010). If Real Parties are correct that Section 2 contains a "much narrower" grant of power than the earlier draft, the earlier draft therefore "differs significantly" from Section 2 and is therefore of "little value" in interpreting Section 2. Real Parties Brief at 66; *Samantha C.*, 185 Cal. App. 4th at 1489-90.

The second principle of statutory interpretation—that little can be discerned from legislative inaction—also renders the early draft of Section 2 inapposite. *Tomlinson v. Qualcomm, Inc.*, 97 Cal. App. 4th 934, 942 (2002) ("[L]egislative inaction is a thin reed from which to divine the intent of the Legislature."); *Lolley v. Campbell*, 28 Cal. 4th 367, 378-79 (2002) ("We can rarely determine from the failure of the Legislature to pass a particular bill what the intent of the Legislature is with respect to existing law.") (quotation omitted). Here, the Legislature could have failed to enact the earlier draft's language for any number of reasons, none of which Real Parties discuss. *See* Real Parties Brief at 66. Real Parties therefore read far too much into what the Legislature did not do.

The other historical event to which Real Parties point is a 1934 proposed amendment to Section 2 that "would have expanded the Legislature's authority under the 1928

amendment" but that "was soundly defeated." *Id.* (citing Bezerra, California Water Law, at 183). Into this defeat Real Parties read a rejection of the Legislature's authority to effectuate Section 2's reasonableness mandate. *Id*. But the 1934 proposed amendment was likely defeated for reasons other than a desire to limit, or to express a limited view of, such authority.

Specifically, the amendment would have gone far beyond increasing the Legislature's power to determine the reasonableness of water uses. *See* U.C. Hastings Scholarship Repository, *Voter Information Guide for 1934, General Election* pt. II, p. 41 (proposing legislative authority to enact laws, e.g., "for determining the flow of water in any stream or stream system" and "for determining rights or claims to the use of water in or from any stream or stream system").[15] The 1934 amendment also would have allowed the State to "lend or to authorize the lending of the credit of the State in aid of any State agency incurred in the [acquisition or development] of water and water resources," and required any resulting debt to be paid off within seventy years of issuance. *Id.* Moreover, the Legislature would have been required to impose an ad valorem tax to cover an agency's potential default on the loan. *Id.* at pt. II, p. 42.

It is no surprise that, in the midst of the Great Depression, the California electorate would choose to vote down a constitutional amendment that would have empowered the Legislature to control California's water system and loan

[15] https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1338&context=ca_ballot_props.

California's credit, and imposed an additional tax upon its people. In addition, and perhaps for these reasons, the 1934 proposed amendment faced considerable opposition, while Section 2 did not. Bezerra, California Water Law, at 174 (Real Parties' own source recognizing that Section 2 faced "no organized opposition at all" and that, "shortly after its 1928 passage, PG&E and other electrical utilities began opposing laws intended to involve the state more deeply in water management"); *compare* U.C. Hastings Scholarship Repository, *Voter Information Guide for 1934, General Election* pt. I, p. 26 (includes an opposing argument) *with* ballot of 1928 amendment (Real Parties Motion for Judicial Notice Ex. B11, Vol. 1, p. 145) (no opposing argument).

In short, Section 2's history does not support the Court of Appeal's or Real Parties' cabined view of the Legislature's authority to determine the reasonableness of water uses under Section 2, including through Section 5937. Rather, that history shows what Section 2 says: that the Legislature has the power to effectuate Section 2's requirement that all uses of water be reasonable.

II. Section 2's self-executing nature does not require ad-hoc judicial balancing of reasonableness, as the Court of Appeal believes.

Section 2 is self-executing; the question is how. All parties in this case agree that Section 2 did more than just overturn *Herminghaus*. As the Court of Appeal explains, Section 2 has an "independent legal effect . . . which is a consequence of its self-executing nature." *BBTK*, 110 Cal. App. 5th at 352. The Court of

Appeal imagines this "independent legal effect" to be that "reasonableness must always be evaluated before a court orders any particular water use." *Id*. at 353. However, as we explain below, Section 2's "self-executing nature" simply works to ensure that some deliberative body has determined that a given water use is "reasonable," and that such determination is not "manifestly unreasonable."[16]

In Section 5937, the Legislature has done its part to satisfy Section 2's self-execution. All that Section 2 further requires is that the use of water that Section 5937 requires in this case—to keep below-dam fish "in good condition" in the Kern River—is not "manifestly unreasonable." *CalTrout I*, 207 Cal. App. 3d at 625. This understanding of Section 2 follows from fundamental California constitutional law principles and a century of Section 2 jurisprudence. We discuss each in turn below, while explaining the deficiencies in the Court of Appeal's and Real Parties' contrary views.

A. Section 2's self-execution demands Bring Back the Kern's interpretation of the law.

In California, constitutional provisions are self-executing to the extent they "suppl[y] a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed

[16] Bring Back the Kern's view of the law satisfies Section 2's self-execution. *See* Bring Back the Kern Opening Brief at 50-54 (explaining how Section 5937 is a legislative determination of reasonableness within the explicit grant of Section 2).

may be enforced." *Chesney v. Byram*, 15 Cal. 2d 460, 462 (1940) (quotation omitted).

Section 2 provides such a "sufficient rule." Section 2 requires that uses of water cannot be unreasonable. Cal. Const. art. X, § 2. Thus, "[i]f a statute sanctioned a manifestly unreasonable use of water, it would transgress the constitution." *CalTrout I*, 207 Cal. App. 3d at 625. This self-executing test has been used as a lever for challenging water uses, including limiting previously unlimited riparian water uses in cases like *Gin S. Chow* and the others discussed below. This rule has also been used to limit other unreasonable water uses. *See, e.g.*, *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 3 Cal. 2d 489, 568 (1935) (using water to drown gophers "cannot be held to be a reasonable beneficial use"); *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 141 (1967) (the "use of such waters as an agent to expose or to carry and deposit sand, gravel and rock, is as a matter of law unreasonable within the meaning of" Section 2).

Where a self-executing provision has been the subject of implementing legislation, "the court must limit enforcement to the procedures established by the Legislature." *Kinlaw v. State*, 54 Cal. 3d 326, 334 (1991).[17] Section 2 anticipated that it often would be executed by legislation, providing that "the Legislature

[17] This rule from *Kinlaw* applies "[u]nless the exercise of a constitutional right is unduly restricted . . . ." 54 Cal. 3d at 334. No party in this case contends or has contended that Section 2 creates such a "constitutional right," or that any such right is "unduly restricted" by or under Section 5937.

may also enact laws in the furtherance of the policy in this section contained." Cal. Const. art. X, § 2. Today, that body of executing legislation is copious, and it includes Section 5937. *See supra* at 32-37 (enumerating part of the broad constellation of legislation referencing and effectuating Section 2). Thus, under *Kinlaw* and Section 2's explicit grant of legislative authority, courts must defer to legislative reasonableness determinations, including Section 5937.

The Court of Appeal's decision ignores all this—that a workable rule for Section 2's self-execution already exists, and that the Legislature has already enacted laws to effectuate Section 2, including Section 5937. *See BBTK*, 110 Cal. App. 5th at 353, 356 (holding as a blanket rule that "reasonableness must always be evaluated before a court orders any particular water use" based on "the totality of the circumstances"). The Court of Appeal thus has invented a reasonableness-balancing mandate to enforce rights already protected via other procedures. *See id.* at 356; *Kinlaw*, 54 Cal. 3d at 334; *Cnty. of Contra Costa v. State*, 177 Cal. App. 3d 62, 75 (1986) ("[T]he fact that a constitutional provision is self-executing does not relieve a party from complying with reasonable procedures for assertion of the right.").

Of course, Section 2's self-execution would demand such balancing in cases where neither the Legislature nor a body exercising delegated legislative authority has made such a water-use reasonableness determination. But reasonableness is first and foremost a policy choice; where, as here, the Legislature has

weighed competing policies and reached a decision, and that decision is not manifestly unreasonable, the judiciary's role is limited to enforcing the Legislature's policy choice. *See supra* at 32-37; *Santa Ana Hosp. Med. Ctr.*, 56 Cal. App. 4th at 836 ("It is for the Legislature to make public policy.").

In sum, the Court of Appeal's lack of engagement with these fundamental constitutional law principles and legislative enactments demonstrates its misunderstanding of Section 2's "self-execution." Every word in Section 2 does not generate a cause of action simply by virtue of the provision being "self-executing." Instead, Section 2's self-executing nature means that the Legislature may and does adopt statutes determining "reasonable" uses of water, and courts may and do assure those condoned uses are not "manifestly unreasonable." This view of Section 2's self-execution is further supported by a century of Section 2 jurisprudence.

B. A century of Section 2 jurisprudence militates against the Court of Appeal's view.

1. *Gin S. Chow* does not require universal judicial reasonableness determinations.

The Court of Appeal's opinion relies nearly exclusively on this Court's 1933 decision in *Gin S. Chow* to explain that, under Section 2, "a court must always consider reasonableness whenever it would direct or adjudicate a particular use of water . . . ." *BBTK*, 110 Cal. App. 5th at 351; *see also id.* at 347-49.[18] To reach this outcome, the Court of Appeal seizes on a

[18] The only authority the Court of Appeal cites beyond *Gin S. Chow* is a footnote in *National Audubon*. *BBTK*, 110 Cal. App.

single phrase in *Gin S. Chow*: that Section 2 "must be made effectual in all case[s] . . . ." *BBTK*, 110 Cal. App. 5th at 348 (quoting *Gin S. Chow*, 217 Cal. at 700) (alteration in *BBTK*). Real Parties endorse the Court of Appeal's approach, opining that the "Court of Appeal merely held reasonableness is 'case specific' . . . . In doing so, the Court of Appeal applied this Court's rule from *Gin Chow*." Real Parties Brief at 33 (internal citations omitted).

However, the phrase "must be made effectual in all case[s]" cannot be understood so divorced from its context. *Gin S. Chow*, 217 Cal. at 700. The issue in *Gin S. Chow* was "whether the law of riparian rights in this state must be modified to conform to a direct and positive constitutional declaration." *Id*. at 699. *Gin S. Chow* said nothing about legislative determinations of reasonable use, as none was at issue in that case. *Id*. at 699-701; *see also* Bring Back the Kern Opening Brief at 54-56.

Accordingly, in holding that Section 2 "must be made effectual in all case[s]," *Gin S. Chow* recognized that Section 2 ended the law of *Herminghaus* and required that all uses of water, including previously exempt riparian uses, not be unreasonable. *See Gin S. Chow*, 217 Cal. at 700-01. Nowhere did *Gin S. Chow* suggest or demand that judges themselves determine what "reasonable" means where the Legislature has already done so via statute.

5th at 353 (quoting *Nat'l Audubon Soc'y*, 33 Cal. 3d at 447 n.30). That footnote merely clarifies that the Water Code does not create an "absolute priority" for domestic water uses when designating them as the "highest use." *Nat'l Audubon Soc'y*, 33 Cal. 3d at 447 n.30.

2. Subsequent case law similarly militates against the Court of Appeal's decision.

In *National Audubon*, this Court reiterated Section 2's mandate: "This amendment [Section 2] does more than merely overturn *Herminghaus*—it establishes state water policy. All uses of water, including public trust uses, must now conform to the standard of reasonable use." 33 Cal. 3d at 443. As in *Gin S. Chow*, nothing in *National Audubon* states or even suggests that judges must in every case make a general reasonableness determination.

CalTrout I is even less hospitable to the Court of Appeal's view of Section 2's self-executing nature. *CalTrout I* expressly recognized the Legislature's authority "to enact statutes which determine the reasonable uses of water." 207 Cal. App. 3d at 625. In so doing, *CalTrout I* rejected the proposition that Section 2 or *Gin S. Chow* requires fact-specific balancing of every use of water, explaining that the defendant in *CalTrout I* "takes this [*Gin S. Chow*'s discussion of Section 2] as a rule that the question of reasonableness invariably must be resolved ad hoc, adjudicatively, and there is no place for the legislative articulation of rules concerning reasonableness. That certainly is not the holding of *Gin S. Chow* . . . ." *Id.* at 624.

Specifically, in *CalTrout I*, the Third District Court of Appeal rejected a challenge under Section 2 to Section 5946 of the Fish & Game Code. *Id.* at 592-93. The court refused to "override" statutory enactments that are not "manifestly unreasonable." *Id.* at 625; *see also id.* at 593, 625 ("If a statute sanctioned a manifestly unreasonable use of water, it would transgress the

constitution."). Thus, *CalTrout I* explicitly embraced the as-applied test of Section 2's self-execution.

The Court of Appeal dismisses *CalTrout I* and *II* as irrelevant because they construe Section 5946, not Section 5937. According to the Court of Appeal, "[j]ust because section 5946 reflects the Legislature's balancing of the specific, localized needs . . . does not mean the Legislature engaged in a similar determination as to all waterways statewide under section 5937." *BBTK*, 110 Cal. App. 5th at 356. But this is a distinction without a difference: Section 2's self-executing nature does not change based on the geographic scope of the legislative determinations of reasonableness that it enables. *CalTrout I* and *II* have been good law for nearly 40 years; they apply to Section 5937 just as much as to 5946; this Court should use this case to hold so explicitly.[19]

3. Real Parties' cases do not support their contrary arguments.

Like the Court of Appeal, the Real Parties rely on *Gin S. Chow* to erroneously argue that Section 2 categorically requires ad-hoc reasonableness balancing. Real Parties Brief at 33-35. Real Parties make the same mistake in relying on four other

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[19] In *San Luis Obispo Coastkeeper v. County of San Luis Obispo*, 161 F.4th 590, 602 (9th Cir. 2025), the U.S. Court of Appeals for the Ninth Circuit dismissed *CalTrout I* on the same basis as the Court of Appeal in this case (i.e., by saying that *CalTrout I* and *II* concerned Section 5946, not Section 5937). Again, this distinction is immaterial; *CalTrout II*'s statement that "the Legislature has already balanced the competing claims for water . . . and determined to give priority to the preservation of their fisheries," 218 Cal. App. 3d at 201, applies equally to both sections.

cases from the 1930s. *Id.* at 33-34. In none of these cases did this Court carry out, or remand for a lower court to carry out, the fact-specific reasonableness inquiry that Real Parties claim Section 2 requires. Each case simply reflects a straightforward application of Section 2 in the absence of a legislative determination of reasonableness. As such, these cases do not say what Real Parties represent them to say. A sharp reader of this section of the Real Parties' brief will notice that the word "reasonableness" is always *outside* the quotation marks. *Id*. This section addresses each case in turn.

Peabody v. City of Vallejo involved riparian users of Suisun Creek suing to prevent Vallejo from appropriating water based on strict riparian priority, the idea endorsed in *Herminghaus*. 2 Cal. 2d. 351, 359-61, 364 (1935). Real Parties quote *Peabody* as standing for the proposition that "reasonableness 'must be dealt with in connection with each case as it arises.'" Real Parties Brief at 33 (quoting *Peabody*, 2 Cal. 2d. at 369). However, the quoted language attaches not to any general issue of "reasonableness" but rather the narrow question of:

> where, as the result of rainstorms and resulting floods, or of melting snows, or of natural flow otherwise, a large volume of water flows on to the sea, unused, wasted, and lost, how may the same be conserved for useful and beneficial purposes, having due regard for the rights of riparian owners, prior appropriators, and overlying landowners?

Peabody, 2 Cal. 2d. at 369. The decision then states that the answer to this question "must be dealt with in connection with each case as it arises." *Id*. Thus, the case-specific review called for

in *Peabody* has to do with apportioning surplus floodwater among riparian rightsholders, in the absence of a legislative determination of reasonableness. *Peabody* therefore does not support a categorical requirement for judicial reasonableness determinations, especially where the Legislature has made such a determination.

Tulare Irrigation District v. Lindsay-Strathmore Irrigation District concerned whether the diversion of floodwaters represented a beneficial use of water, again in the absence of legislative action. 3 Cal. 2d at 511, 567. *Tulare* stated that "*[w]hat is a beneficial use* at one time may, because of changed conditions, become a waste of water at a later time." *Id.* at 567. (emphasis added). Yet Real Parties claim that the case says that "*what is reasonable* 'at one time may, because of changed conditions, become a waste of water at a later time.'" Real Parties Brief at 33-34 (quoting *Tulare*, 3 Cal. 2d at 567) (emphasis added). Real Parties therefore replace one legal concept with a different—and absent—one that better suits their argument. As in *Peabody*, in *Tulare* no ad hoc reasonableness inquiry occurs, is contemplated, or is required.

Rancho Santa Margarita v. Vail involved yet another downstream riparian rightsholder suing an upstream appropriator while relying "squarely on [*Herminghaus*] to support its position." 11 Cal. 2d 501, 556 (1938). To portray the case as supporting the need for a broad reasonableness inquiry, Real Parties quote the case as stating: "[I]n ascertaining whether [the facts] warrant an injunction, the trial court should take into consideration all of the water available . . . ." Real Parties Brief at

34 (quoting *Rancho Santa Margarita*, 11 Cal. 2d at 558). However, the actual sentence in the case reads: "in ascertaining whether *a lower riparian has suffered damage by reason of an upper riparian's diversion sufficient to* warrant an injunction . . . ." *Rancho Santa Margarita*, 11 Cal. 2d at 558 (emphasis added). By replacing the actual facts, which are all (and only) about riparian water use, with "[the facts]," Real Parties make it appear as though *Rancho Santa Margarita* mandates universal fact-based reasonableness balancing when it does nothing of the sort.

Finally, *Meridian, Ltd. v. City and Cnty. of San Francisco* was yet another case of upstream appropriators being sued by a downstream riparian rightsholder. 13 Cal. 2d 424, 430-31, 443 (1939). Real Parties quote the decision as stating: "Reasonableness is 'necessarily relative' . . . ." Real Parties Brief at 34 (quoting *Meridian*, 13 Cal. 2d at 447). However, the term the court describes as "necessarily relative" is "waste." *Meridian*, 13 Cal. 2d at 447. Thus, *Meridian* simply represents a fourth example of Section 2 being enforced in a specific case and absent a legislative reasonable-use determination. *See id*. at 443, 447-48 (stating the issue of the case to be whether Section 2 restricts waste by inferior rightsholders).

In short, Real Parties have unwittingly provided four judicial decisions that neatly illustrate how, but only how, Section 2's self-execution operates in specific cases and absent legislative direction. None of these decisions bear on Section 2's self-executing effect in this case, as none holds that Section 2

categorically requires judicial rebalancing of Section 5937, which is an express legislative determination of reasonableness. For these reasons, all of these decisions support the view of Section 2's self-execution advanced by *Amici*.

III. The Court's decision in this case will have significant consequences for California water law and California's fish and rivers.

The prior sections explain that the Legislature has the authority to enact, and has enacted, numerous laws that effectuate Section 2's requirement that all uses of water be "reasonable," including Section 5937. *See supra* at 37-42. In holding otherwise, the Court of Appeal reduces Section 5937 to merely "one expression of the Legislature's policy preferences." *BBTK*, 110 Cal. App. 5th at 355. This decision threatens to impede California water law and endanger California's fish and rivers. In contrast, a decision reversing the Court of Appeal and ruling in favor of Bring Back the Kern would ensure the continued protection of the Kern River, its fish, and fish and rivers across California, all with typically nominal amounts of water.

A. Affirming the Court of Appeal would have significant adverse consequences.

1. The Court of Appeal's decision impedes California's water regulatory scheme.

As we have explained, California water law is an intricate system of rights and procedures set out in the common law and by statute and enforced by the State Water Board and the courts. That system reflects a deep history, manifests an intentional

setting of legislative and judicial roles, and, most importantly, depends on all these pieces working together.

One of those components is the Legislature's statutory determination of state water policy, including what it means for a water use to be "reasonable" within the meaning of Section 2. Section 5937 is a categorical—and, again, moderate—determination by the Legislature that maintaining "sufficient water at all times to pass through a fishway, or in the absence of a fishway, [to] allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam" is such reasonable use. § 5937. And it is among the many statutory categorical determinations of reasonable use we discuss above. *See supra* at 32-37.

Were the Court of Appeal's decision to become law, each of those determinations, including Section 5937, would become mere "policy preferences." *BBTK*, 110 Cal. App. 5th at 355. The courts would be obligated to second-guess the Legislature's determinations, eroding the carefully delineated roles that Section 2 helped create. Moreover, such case-by-case adjudication of what constitutes "reasonable" water use would create pervasive uncertainty for water users and regulators. Judges naturally have different views regarding what "reasonable" means. *Cf. Forde v. Vernbro Corp.*, 218 Cal. App. 2d 405, 408 (1963) (quoting Authur Corbin, *Corbin on Contracts*, Section 97) ("Reasonableness is a matter of opinion; and opinions differ, even though they are [equally] honest and well informed.") (internal citations and quotations omitted). As a result, a statute that

would otherwise be enforced by its plain terms would be found unreasonable in one instance and not in another. That is not a workable water-law regime.

2. The Court of Appeal's decision endangers California's fish and rivers.

California has over 1,500 dams. National Inventory of Dams.[20] Although dams reduce flooding and store water, they also negatively impact river ecosystems by "flattening" seasonal flows and creating a physical barrier to migratory fish species. T. E. Grantham & P. B. Moyle, Assessing Flows for Fish Below Dams, Center for Watershed Sciences Technical Report, University of California, Davis, 2, 4 (2014).[21] Dams cause this "flattening" by reducing peak flows and increasing base flows, ultimately altering the structure of downstream riverbeds and decreasing the quality of available fish habitat. *Id*. at 2-3, 5.

Moreover, dams are sometimes operated in a manner that dries up the river or portions of the river upon which they sit. For instance, the Bureau of Reclamation's operation of the Friant Dam turned sixty miles of the San Joaquin River—once habitat for "one of the largest Chinook runs anywhere on the Pacific Coast"—into a virtually dry riverbed. *See Patterson II*, 333 F. Supp. 2d at 924; *supra* at 28-30.

Similarly in this case, the *Los Angeles Times* documented the mass die-off of thousands of fish in the Kern River after the

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[20] https://nid.sec.usace.army.mil/nid/#/ (last visited Apr. 27, 2026).

[21] https://watershed.ucdavis.edu/sites/g/files/dgvnsk8531/files/inline-files/REPORT_5937_final_oct2014_1.pdf.

Court of Appeal issued its decision, which allowed dam operators to reduce flows and dry up the riverbed. Ian James, *'It's really sad': River dries up abruptly in Bakersfield, leaving thousands of dead fish*, L.A. Times (Sept. 19, 2024).[22] Observers found the remains of native Sacramento suckers and non-native bass, sunfish, bullhead catfish, and mosquitofish. *Id.*

Thus, dams have contributed (and continue to contribute) to the "widespread and rapid decline" of the state's fish and are perhaps the "most serious threat to [the] ecological sustainability of rivers." Grantham & Moyle, Assessing Flows for Fish Below Dams at 4-5.

Section 5937's instream-flow mandate is an essential tool for mitigating dams' negative impacts, particularly those arising from flow reductions.[23] Consider again the Friant Dam. After environmental groups sued to enforce Section 5937, and then many subsequent years of litigation including *Patterson I* and *II*, the parties agreed to a settlement. *See supra* at 28-30. Under the settlement, the Bureau of Reclamation must release flows to restore and maintain fish populations. Stipulation of Settlement, *NRDC, et al. v. Rodgers, et al.*, No. CIV S-88-1658 at ¶¶ 13-14 (E.D. Cal. Sept. 13, 2006, *approved* Oct. 23, 2006). Section 5937, by requiring sufficient instream flows to keep below-dam fish "in

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[22] https://www.latimes.com/environment/story/2024-09-19/thousands-of-fish-die-as-kern-river-dries-up-in-bakersfield.

[23] For a broader discussion of Section 5937's history and the history of laws protecting instream flows, *see generally* Börk, 45 U.C. Davis L. Rev. 811; Bring Back the Kern Opening Brief at 28-31 (citing Börk's article).

good condition," is a critical check against dams' adverse ecological impacts.

The Court of Appeal's decision would undermine this check by requiring judges to reassess the Legislature's determination of reasonableness in every instance. *BBTK*, 110 Cal. App. 5th at 356. Such judicial second-guessing would essentially override what the Legislature has already determined is necessary to protect fish—maintaining sufficient below-dam flows to keep fish "in good condition." Because dam owners and operators will not know whether they must comply with Section 5937's plain terms until a court determines that compliance is "reasonable," the Court of Appeal's decision may significantly delay the release of instream flows required under the statute.

For these reasons, affirming the Court of Appeal would impede California's water regulatory system and endanger California's fish and rivers. These consequences stand in stark contrast to the positive benefits that would flow from reversing the Court of Appeal and ruling in favor of Bring Back the Kern. We discuss these positive benefits below.

B. A decision in favor of Bring Back the Kern would ensure continued protection of California's fish and rivers.

The Kern River could be the river it once was. For decades, the Kern was Bakersfield's major environmental and recreational asset. Fish teemed in the Kern's flows and eddies, and the Kern supported entire ecosystems. *See* Kurtis Alexander, *A major California city lost its river. Residents are fighting to revive it*,

San Francisco Chronicle (Apr. 19, 2025).[24] Fishermen cast lines from the shore or small dinghies. *See id.*; Bring Back the Kern (@bringback_thekern), Instagram (depicting men fishing in 1897 and the 1950s); [25] *see generally The River's Story*, Bring Back the Kern.[26] Residents "escape[d] early summer heat" by swimming in the Kern's waters. *Don't go near the water,* Bakersfield Californian, at 9 (May 2, 1946). Ad copy run by the city promoted swimming at Bakersfield Beach Park. Bakersfield Californian, at 16 (June 4, 1948).

The modern Kern "River" is anything but. The river does not flow past the McClung Weir except in years of extreme flood. *BBTK*, 110 Cal. App. 5th at 338. All the water that used to flow through Bakersfield is now gone. *Id*. For fifty years, Bakersfield's citizens have been denied opportunities to boat, fish, swim, and generally enjoy the beautiful gem that first put their city on the map. Indeed, because Bakersfield Beach Park sits just below the Calloway Weir, it has provided swimming access just twice in the fifty summers since 1978. *See id.* at 338. And, as discussed above, the river now has insufficient flows to support fish. Ian James, *'It's really sad': River dries up abruptly in Bakersfield, leaving thousands of dead fish*, L.A. Times (Sept. 19, 2024).

Section 5937 has been and is a bulwark against these and similar dire outcomes for rivers across California. As discussed

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[24] https://www.sfchronicle.com/california/article/kern-river-bakersfield-20231899.php.

[25] https://www.instagram.com/bringback_thekern/p/CRCEtjIA785/ (last visited Apr. 29, 2026).

[26] https://www.bringbackthekern.org/the-river (last visited Apr. 29, 2026).

above in Background Section III, Section 5937's enforcement has restored Putah Creek, Mono Lake's tributary creeks, and the San Joaquin River. Mono Lake, once described by this Court as having its recreational, scenic, and ecological value "imperiled," has been put on the path to recovery. *Nat'l Audubon Soc'y*, 33 Cal. 3d at 424-25. The San Joaquin River's restoration has been similarly remarkable, culminating in the opening of California's newest state park along flows enhanced by Section 5937. Christopher Reynolds, *What to know about California's new state park, a scenic green space where two rivers meet*, L.A. Times (Apr. 23, 2024).[27] In the Mono Basin, the re-watering of four creeks below L.A. Water and Power's diversion dams initiated major ecological restoration of the fishery and habitat that continues today. *Restoration*, Mono Lake Committee;[28] *Mono Basin Streams*, Mono Lake Committee.[29] Properly interpreted and enforced, Section 5937 can be expected to yield the same turnaround for the Kern River.

Furthermore, in saving fish and restoring rivers, Section 5937 yields profound collateral benefits. The statute incentivizes water users, water managers, and environmental advocates to unite around comprehensive restoration programs that *reduce* the water necessary to protect fish. As *Amici*'s cases demonstrate,

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[27] https://www.latimes.com/travel/story/2024-04-23/california-newest-state-park-dos-rios.

[28] https://www.monolake.org/whatwedo/restoration/ (last visited Apr. 28, 2026).

[29] https://www.monolake.org/whatwedo/restoration/streams/ (last visited Apr. 28, 2026).

water agencies confronted with Section 5937 compliance agree to restoration programs that may limit the amount of water required to maintain below-dam fish in good condition. *See supra* at 23-30; Stipulation of Settlement, *NRDC, et al. v. Rodgers, et al.*, No. CIV S-88-1658 (E.D. Cal. Sept. 13, 2006, *approved* Oct. 23, 2006), ¶¶ 9-12 (restoration program and process); Settlement Agreement and Stipulation, *Putah Creek Council*, No. 3 Civil C025527 & 3 Civil C025791, Ex. B §§ III.A.(3), III.A.(6), III.E (program, funding, and process).

Section 5937 also enhances aquifer recharge. Perhaps unknown when the modern version of Section 5937 took shape in 1937, the role of below-dam flows to replenish groundwater supplies is well understood today. Groundwater aquifers are a critical source of California's water, especially in times of scarce precipitation. *See Groundwater*, Cal. Dep't of Water Res. ("During dry years, groundwater contributes up to 60 percent (or more) of the statewide annual supply . . . . About 83 percent of Californians depend on groundwater for some portion of their water supply . . . .").[30] Below-dam flows have buttressed groundwater levels in both the San Joaquin River and Putah Creek watersheds.[31] The same could be expected for the Kern

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[30] https://water.ca.gov/water-basics/groundwater (last visited Apr. 29, 2026).

[31] *See* Monty Schmitt, NRDC, *Digging Out of the Subsided Hole We're In: Restore the San Joaquin River and Its Floodplains to Recharge Groundwater Basins and Stop Subsidence*, https://www.nrdc.org/bio/monty-schmitt/digging-out-subsided-hole-were-restore-san-joaquin-river-and-its-floodplains (June 3, 2016) (San Joaquin River 2006 settlement agreement flows had

River, benefiting the hundreds of thousands of people who depend on groundwater in the Central Valley.

Perhaps most remarkable about Section 5937 is the amount of water it requires—usually not much, it turns out. Implementation of the Putah Creek settlement has required just 2.8 percent of average annual deliveries to Solano County water users. *See* Eugene B. Yates, *Estimating the "water cost" of implementing releases from Putah Diversion Dam to meet the requirements of the Putah Creek Accord*, Putah Creek Council (Apr. 13, 2026).[32] Section 5937's application also improved the timing of releases to the great benefit of Putah Creek's native fish. *See* Andrew Rypel et al., *Putah Creek's Rebirth: A Model for Reconciling Other Degraded Streams?*, Cal. WaterBlog (July 8, 2023). Section 5937 further spurred millions of dollars in consensus-based restoration funding. *See* U.C. Davis, *Restored Stream Supports New Wild Salmon Run* (Oct. 15, 2025) (reporting over $20 million in restoration grants).[33] This ongoing

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provided more than 300,000 acre-feet of groundwater recharge); San Joaquin River Restoration Program, *Groundwater Recharge*, U.S. Bureau of Reclamation, https://restoresjr.net/infrastructure/groundwater-recharge/ (updated Dec. 16, 2025) (describing federal authorization of $50 million to construct facilities to assist groundwater recharge associated with the settlement flows); *Putah Creek*, Solano County Water Agency, https://scwa2.com/putah-creek/ (last visited Apr. 29, 2026) (explaining how Putah Creek Accord flows recharge groundwater).

[32] https://putahcreekcouncil.org/wp-content/uploads/2026-Accord-water-cost-determination.pdf.

[33] https://www.ucdavis.edu/climate/news/restored-stream-supports-new-wild-salmon-run.

restoration program maximizes the water dedicated to maintaining the Putah Creek's fish "in good condition." A unique assemblage of co-evolved Central Valley native fish once again thrives in the Creek, and, in the winter of 2025, more than two thousand Chinook salmon migrated from the Pacific Ocean, through the Bay-Delta Estuary, and up Putah Creek. *See* Todd R. Hansen, *Early Fall Return Estimate Climbs to Over 2,100 Fish in Putah Creek*, Daily Republic (Dec. 17, 2025).[34]

For the San Joaquin River, the 2006 settlement flows that ensure compliance with Section 5937 are restoring over sixty miles of river habitat. Depending on water-year type, these flows represent up to 23 percent of unimpaired river flows. *Updated 2022 Restoration Allocation & Default Flow Schedule*, San Joaquin River Restoration Program, at 8 (Mar. 25, 2022).[35] On average, implementing the settlement flows results in about a 15 percent reduction in deliveries to water contractors. *Frequently Asked Questions*, San Joaquin River Restoration Program (Dec. 2007).[36] The actual water-user impact in any given year will likely be smaller, because the settlement's water management provisions reduce user impacts through water recapture, recirculation, transfers, and other measures. *See id.*

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[34] https://www.dailyrepublic.com/news/early-fall-return-estimate-climbs-to-over-2-100-fish-in-putah-creek/article_d3214aaa-1f48-4c6f-a0d9-c3d7dac68459.html.

[35] https://restoresjr.net/wp-content/uploads/2025/05/2648___20220325-SJRRP-Restoration-Allocation-Update.pdf.

[36] https://restoresjr.net/1274___final_faq_fact-sheet_121007/.

The new below-dam flows are yielding impressive environmental benefits. Spring-run Chinook salmon have returned to the San Joaquin River for ten consecutive years since 2016—the first such returns in sixty years. *Record-Breaker! Salmon Return in Droves for 2025*, San Joaquin River Restoration Program.[37] Today, the settlement's San Joaquin River Restoration Program is active across 150 miles of the River and involves building fish infrastructure, channel improvements, and water recirculation. *See generally Who We Are*, San Joaquin River Restoration Program.[38]

Good condition flows required below the Mono Basin diversions are realized in today's "stream ecosystem flows." Greg Reis, *Estimating the "water cost" of implementing releases from Mono Basin streams to meet the Stream Ecosystem Flow (SEF) requirements of Water Rights Order 2021-86*, at 2 (Mar. 26, 2026). Diversion dam releases, made to comply with this Court's *National Audubon* decision to stabilize Mono Lake, exceed these Section 5937 flows. *Id*. Therefore, the mandated instream flows, on average, do not burden water uses in or for Los Angeles. This situation is consistent with watersheds elsewhere in California where flows required to protect a terminal ecosystem exceed fishery protection flows higher in a watershed. *Id*. at 2. If Section 5937 flows were the limiting factor for L.A. Water and Power exports from the Mono Basin, they would constitute

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[37] https://restoresjr.net/story/record-breaker-salmon-return-in-droves-for-2025/ (last visited Apr. 29, 2026).

[38] https://restoresjr.net/about/who-we-are/ (last visited Apr. 29, 2026).

approximately 13 percent of Los Angeles's water demand. *Id.* at 1.

As in other Section 5937 contexts, judicial and State Water Board decisions and settlements have led to a fisheries-restoration program for the Mono Basin creeks.[39] The restoration program has amplified the benefits of the creeks' flows and the benefits to below-dam fish. *See* State Water Res. Control Bd., Order WR 2021-0086 EXEC, at 16-18. Approximately twenty miles of once-dewatered creek beds are under the restoration program initially required by *CalTrout II*. Trout have begun returning to "good condition" in the reborn riparian and riverine habitat. *See Mono Basin Streams*, Mono Lake Committee (describing restoration of Rush, Lee Vining, Parker, and Walker Creeks since the 1994 State Water Board decision).

The continued protection of California's fish and rivers should not be in doubt. The California Legislature has provided lasting protection in Section 5937; the statute need only be properly interpreted, implemented, and enforced to achieve it.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Joint Opening and Reply Briefs of Plaintiffs and Respondents

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[39] *See* Decision 1631, at 12; State Water Resources Control Bd., Order WR 98-05 (1998) (initiating the current program); State Water Res. Control Bd., Order WR 2021-0086 EXEC, In the Matter of Licenses 10191 and 10192 (Applications 8042 and 8043) Held by the City of Los Angeles, Department of Water and Power, at 3-5, 9-10 (Oct. 1, 2021).

Bring Back the Kern, et al., this Court should reverse the Court of Appeal's decision and remand for further proceedings.

Date: May 1, 2026 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

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/s/ *Matthew J. Sanders*

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