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Supreme Court of California
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No. S290840

In the Supreme Court of the State 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.

Fifth Appellate District, Case No. F087487 (and consolidated cases)
Kern County Superior Court, Case No. BCV-22-103220
The Honorable Gregory A. Pulskamp, Judge

AMICUS BRIEF OF THE CALIFORNIA ATTORNEY GENERAL AND APPLICATION OF THE CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE TO FILE PROPOSED AMICUS BRIEF IN SUPPORT OF PLAINTIFFS

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STATEMENT OF INTERESTS AND APPLICATION TO FILE AMICUS BRIEF

This case concerns application of Fish and Game Code section 5937, which requires dam owners to release sufficient water to keep downstream fish in good condition. The Attorney General and the California Department of Fish and Wildlife have strong interests in the matter. The Attorney General is the "chief law officer of the State" and is charged with protecting the State's environment and natural resources. (Cal. Const., art. V, § 13; Gov. Code, §§ 12606, 12607.) The Department administers the Fish and Game Code and is the state trustee agency for California's fish and wildlife resources. (Fish & G. Code, §§ 702, 711.7, subd. (a), 1802.) Given their interests in this case, the Attorney General and the Department participated as amici in the Court of Appeal proceedings. They also later requested that this Court order depublication of the Fifth Appellate District's decision or, in the alternative, grant plaintiffs' petition for review.

Now that this Court has granted review, the Attorney General and the Department believe their experience interpreting and applying section 5937 will assist the Court in resolving this case. The Attorney General may file an amicus brief without the Court's permission (Cal. Rules of Court, rule 8.520(f)(8)), but respectfully requests leave to submit this brief on behalf of the Department as well.[1]

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[1] No party in this litigation, counsel for any party, or any other person or entity authored or made any monetary contribution intended to fund the preparation or submission of this brief. (Cal. Rules of Court, rule 8.520(f)(4).)

INTRODUCTION

The directive in Fish and Game Code section 5937 is unmistakably clear: The owner or operator of any dam shall "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." The Legislature enacted this statute to protect fish that the State holds in trust for the benefit of the public. The provision reflects a legislative determination that releasing sufficient water to protect those fish is a presumptively reasonable use of water, and, by extension, that depriving them of the water they need to survive is presumptively unreasonable. That determination is consistent with longstanding public nuisance law and the express recognition in article X, section 2 of the California Constitution that the Legislature may "enact laws in the furtherance of the policy" of reasonable water use.

As a valid legislative enactment, section 5937 must be given effect. At the same time, like any statute, it remains subject to constitutional limits and may be challenged as applied. The questions presented in this appeal—and the grounds on which the Court granted review—are how, and when, courts should assess whether a particular application of section 5937 violates the reasonable use requirement in article X, section 2. The answers to those questions are consequential and—if the views of the real parties in interest or defendant prevail—could effectively nullify the legislative policy reflected in section 5937 and undermine the State's ability to address important considerations of reasonable water use at the statewide level.

The Attorney General and the Department respectfully submit that where, as here, a plaintiff seeks to enforce section 5937, a party contesting such enforcement has the burden of raising and proving any as-applied constitutional challenge. And, consistent with *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 625 (*Cal-Trout I*), application of the statute should be found to violate article X, section 2 only where releasing sufficient water to keep downstream fish in good condition would be "manifestly unreasonable" under the circumstances. Requiring instead that plaintiffs must prove as-applied constitutionality as part of their affirmative case—or that courts must second-guess the Legislature's reasonableness determination sua sponte and without appropriate deference—would largely strip section 5937 of effect and improperly invite judges to substitute their policy preferences for the Legislature's.

Real parties' suggestion that the Court should dismiss review also is meritless. The Court granted plaintiffs' petition for review to address the precise arguments they present in their opening brief. It is real parties' answering brief, by contrast, that raises new arguments not properly presented to this Court, such as their facial constitutional challenge to section 5937 and their contention that the statute applies only where a dam owner has been ordered to install a fishway. In any event, those arguments contradict the plain text and purpose of article X, section 2 of the Constitution and section 5937. Real parties' new arguments also defy decades of administrative practice and judicial precedent.

Presumably disappointed by the Court's decision to grant plenary review in this case, real parties now attempt to persuade the Court that the case is procedurally messy or difficult enough to justify dismissal. For good reason, that type of strategy rarely succeeds, and it should not do so here. The Court should resolve the issues on which it granted review, reverse the Fifth Appellate District's decision, and remand for further superior court proceedings consistent with this Court's opinion.

LEGAL BACKGROUND

A. Fish and Game Code section 5937

Section 5937 of the Fish and Game Code—which has existed in its current form for nearly a century—provides that the "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." (Fish & G. Code, § 5937.) "Owner" is defined to include the "operat[or]" of a dam. (*Id.*, § 5900, subd. (c).) And "shall" in section 5937 is "mandatory." (*Id.*, § 79.) Section 5937 therefore "requires the release of water from a dam for use in the maintenance of fish populations below." (*Cal-Trout I*, *supra*, 20 Cal.App.3d at p. 606; accord *San Luis & Delta-Mendota Water Authority v. Haugrud* (9th Cir. 2017) 848 F.3d 1216, 1234 [section 5937 "requires" dam owners to release sufficient water to "keep in good condition" any fish that may exist below the dam].)

By imposing this mandatory duty on dam owners, the Legislature sought to protect downstream fish that the State holds in trust for the public. (Cf. *People v. Monterey Fish*

Products Co. (1925) 195 Cal. 548, 563 ["property in the fish within the waters of the state are vested in the state of California and held by it in trust for the people of the state"].) The State's "'power to protect and preserve'" fish in streams and lakes, for the "'common use and benefit'" of the public, is "'one of the recognized prerogatives of the sovereign.'" (*People v. Rinehart* (2016) 1 Cal.5th 652, 661, quoting *People v. Truckee Lumber Co.* (1897) 116 Cal. 397, 399-400.) For example, the Attorney General has brought lawsuits that enjoined, as a public nuisance, activities which killed fish in the State's rivers. (E.g., *Truckee Lumber*, at pp. 399-402 [enjoining sawmill from dumping refuse in Truckee River]; *People v. Glenn-Colusa Irrigation Dist.* (1932) 127 Cal.App. 30, 35-38 [enjoining unscreened water diversion in Sacramento River].) And because the State holds the "fish in its streams in trust for the public," statutory enactments that further its "substantial interest in the protection of the state's fish" are also "inherent in the state's sovereign power." (*People v. Murrison* (2002) 101 Cal.App.4th 349, 360-361; see *In re Makings* (1927) 200 Cal. 474, 481-482.) "Section 5937 of the Fish and Game Code," the Attorney General has explained, "is such an enactment by the state in carrying out its trust responsibility to preserve fishery resources" for the beneficial use of the people. (57 Ops.Cal.Atty.Gen. 577, 582-583 (1974).)

B. California Constitution article X, section 2

Article X, section 2 of the California Constitution declares that the State's water resources shall "be put to beneficial use to the fullest extent of which they are capable, and that the waste or

unreasonable use or unreasonable method of use of water be prevented." (Cal. Const., art. X, § 2.) The section limits all water rights in the State to "such water as shall be reasonably required for the beneficial use to be served," and adds that any water right "does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." (*Ibid.*) The section is "self-executing" and expressly provides that "the Legislature may also enact laws in the furtherance of the policy in this section." (*Ibid.*)

The provision was added to the Constitution in 1928 as a direct response to this Court's decision in *Herminghaus v. Southern California Edison Co.* (1926) 200 Cal. 81, which had held that the common law reasonable use doctrine did not limit a riparian landowner's water use as against an upstream appropriative water user. (*Id.* at pp. 100-103.)[2] The decision also suggested that the Legislature lacked authority, in the Water Commission Act of 1913, to limit riparian water rights to reasonable and beneficial uses or to proscribe the amount of water a riparian could use for irrigation of uncultivated land. (*Id.* at pp. 115-118; see Stats. 1913, ch. 586, §§ 11, 42, pp. 1017-1018, 1033.) In dissent, Justice Shenk criticized the majority for undermining the Legislature's authority. (*Herminghaus*, at pp. 123-131 (dis. opn. of Shenk, J.).) He argued that the Legislature should have the "right in the first instance to

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[2] Riparian rights govern the beneficial use of water on land contiguous to a watercourse, while appropriative rights govern diversion for storage and beneficial use of water on non-riparian land. (*People v. Shirokow* (1980) 26 Cal.3d 301, 307 & fn. 7.)

prescribe the standards of beneficial use and reasonable necessity." (*Id.* at p. 125.)

The 1928 constitutional amendment "overturn[ed] *Herminghaus*" and established, as a matter of "state water policy," that "all uses of water, including public trust uses, must conform to the standard of reasonable use." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443.) The amendment's express recognition of the Legislature's authority to enact laws regarding reasonable use also reflects that the "framers of article X, section 2" understood the "importance of broad legislative authority for the conservation and regulation of scarce water resources." (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 351-352 & fn. 6.)

STATEMENT OF THE CASE

The Kern River originates in the Sierra Nevada mountains and flows through the City of Bakersfield. (*Bring Back the Kern v. City of Bakersfield* (2025) 110 Cal.App.5th 322, 335.) The City operates several weirs along the river that divert water for the City's use as well as for use by local water districts, which are real parties in interest in this case. (*Id.* at p. 334.) Before this lawsuit, the river had not flowed past the City's last weir "on a sustained basis" for decades. (*Id.* at p. 338.)

Plaintiffs sued the City and petitioned for a writ of mandate, alleging that the City violated its duty under section 5937 to allow sufficient water past its weirs to keep downstream fish in good condition. (*Bring Back the Kern*, *supra*, 110 Cal.App.5th at p. 339; see Code Civ. Proc., § 1085, subd. (a).) Those weirs are

"artificial obstructions" that qualify as dams under the statute. (Fish & G. Code, § 5900, subd. (a); see *Goddard v. Dept. of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 365.) Plaintiffs also sought a preliminary injunction against the City; they argued that the chronically dry riverbed below its weirs demonstrated a violation of section 5937. (*Bring Back the Kern*, at pp. 349-350.)

The water districts opposed the preliminary injunction. (*Bring Back the Kern*, *supra*, 110 Cal.App.5th at p. 340.) They argued that plaintiffs were unlikely to succeed on the merits of the section 5937 claim, but they did not raise article X, section 2 or its reasonable use requirement as part of their merits defense. (6 AA 1359-1367.) Instead, they invoked that constitutional provision only in separately arguing that an injunction would be contrary to the public interest, on the basis that requiring the City to maintain flows in the river would mean "water is wasted in contravention of Article X, Section 2." (6 AA 1374-1376.) The City's opposition to the preliminary injunction made no mention of article X, section 2. (11 AA 2370-2388.)

The superior court issued a preliminary injunction in November 2023 directing the City to release enough water from its weirs to keep downstream fish in good condition. (*Bring Back the Kern*, *supra*, 110 Cal.App.5th at p. 341.) The court concluded that plaintiffs had a "very high" likelihood of success on the merits because "a plain reading of the statute supports Plaintiffs' claim that Section 5937 prevents a dam owner from diverting all the water in a river." (12 AA 2780-2781.) The court also balanced the potential harms to the parties. (12 AA 2781-2786.)

In balancing the harms for purposes of issuing the preliminary injunction, and based on the evidence then before it, the superior court found that "imposing Section 5937's flow requirements on [the City] would likely have no impact on the domestic water supply" for Bakersfield residents. (12 AA 2784.) The court also observed that the average annual river flow provided "an enormous amount of water that should suffice for the reasonable use of all interested stakeholders." (12 AA 2785.) And the court found that, without an injunction, there would be "a completely dry, dead river channel," which would cause "significant harm" to the public and the environment. (12 AA 2785-2786.) Although the court referenced article X, section 2 in its introduction and balance-of-harms analysis (12 AA 2772-2773, 2785), it did not address in its merits analysis whether application of section 5937 in this case would be constitutionally reasonable under that provision (12 AA 2777-2781, 2786).

The water districts appealed, arguing that the superior court erred by not assessing the constitutional reasonableness of allowing sufficient water for fish under section 5937 when evaluating plaintiffs' likelihood of success on the merits. (Joint AOB 28-39.)[3] The Attorney General and the Department participated as amici in the Court of Appeal in support of plaintiffs. (See *Bring Back the Kern*, *supra*, 110 Cal.App.5th at pp. 333, 350.) They argued, among other things, that section

[3] A landowner, J.G. Boswell, had intervened as a real party after the preliminary injunction issued and also appealed, raising similar arguments. (Boswell AOB 16-20.) This brief refers to the water districts and Boswell collectively as "real parties."

5937 reflects a legislative determination that releasing sufficient water for fish below dams is a presumptively reasonable use of water, and that courts are not required to consider constitutional reasonableness in order to find a violation of the statute.

The Court of Appeal reversed. It held that, under article X, section 2, 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." (*Bring Back the Kern*, *supra*, 110 Cal.App.5th at p. 351, italics added.) The court concluded it was "constitutional error" for the superior court to apply section 5937 "without giving direct effect to the reasonableness provisions of [article X,] section 2" when analyzing the "'underlying, substantive issue'" of whether plaintiffs were likely to succeed on the merits. (*Id.* at pp. 335, 356; see generally *id.* at pp. 351-356.)

Plaintiffs petitioned this Court for review. They argued that section 5937 is a valid legislative determination of reasonable use and should be enforced by its terms unless a party opposing enforcement shows that its application is unconstitutional as applied. (Pet. 24-31.) The Court granted review.

ARGUMENT

I. SECTION 5937 SHOULD BE ENFORCED AS WRITTEN, UNLESS A PARTICULAR APPLICATION IS SHOWN TO BE MANIFESTLY UNREASONABLE UNDER ARTICLE X, SECTION 2

Section 5937 is a valid legislative enactment to protect fish below dams that the State holds in trust for the benefit of the public. It is also a legislative determination that releasing sufficient water to keep those fish in good condition is a

presumptively reasonable use of water. That determination is consistent with article X, section 2's express recognition that the Legislature may "enact laws in the furtherance of the policy" of reasonable water use. A party opposing enforcement of section 5937 can, of course, challenge application of the statute as unconstitutional under article X, section 2. But the party raising the defense bears the burden of proving such an as-applied constitutional challenge, and a reviewing court should defer to the Legislature's policy choices in section 5937. A court should find an as-applied constitutional violation only where releasing sufficient water to keep fish below dams in good condition is shown to be "manifestly unreasonable" under the circumstances.

A. Section 5937 is a facially valid legislative determination of reasonable water use

1. The Legislature enacted section 5937 in furtherance of the policy of reasonable use

a. Article X, section 2 enables the Legislature to exercise "broad authority" in "determining the appropriate means for protecting scarce state water resources." (*Long Valley*, *supra*, 25 Cal.3d at pp. 351-352; see *ante*, pp. 18-20.) The provision expressly recognizes that the Legislature may "enact laws in the furtherance of the policy in this section." (Cal. Const., art. X, § 2.) That includes "'enact[ing] statutes which determine the reasonable uses of water.'" (*Los Angeles Waterkeeper v. State Water Resources Control Bd.* (2023) 92 Cal.App.5th 230, 268, quoting *Cal-Trout I, supra*, 207 Cal.App.3d at p. 625; accord *Stanford Vina Ranch Irrigation Co. v. State of California* (2020)

50 Cal.App.5th 976, 999-1004; *Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1483-1485.)

Section 5937 is one such statute "where the Legislature has recognized that a particular use of water is 'reasonable.'" (City ABM 18.) In providing that dam owners "shall allow sufficient water at all times . . . to pass over, around or through the dam" to keep fish downstream in "good condition" (Fish & G. Code, § 5937), the statute "requires the release of water from a dam for use in the maintenance of fish populations below" (*Cal-Trout I*, *supra*, 207 Cal.App.3d at pp. 605-606; accord *San Luis & Delta-Mendota*, *supra*, 848 F.3d at p. 1234 [use of "shall" in section 5937 "requires" the release of sufficient water].) Like other neighboring provisions that also "impose affirmative duties on dam owners to take steps to preserve and protect the fish," section 5937 derives from the "long-settled" principles, described above (*ante*, pp. 17-18), that the State holds fish "in trust for the people" and has "authority to regulate to protect and preserve this valuable public resource." (*State of California v. San Luis Obispo Sportsman's Assn.* (1978) 22 Cal.3d 440, 448-449; see *Cal-Trout I*, at pp. 626, 629-631.)[4] Section 5937 represents the

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[4] Real parties discuss the common law public trust doctrine applicable to the State's water resources. (RPI ABM 22.) But they overlook statutes and other common law precedents that address a separate branch of the public trust doctrine applicable to the State's fish and wildlife resources. A statute codifying the State's trustee role as to fish and wildlife (Fish & G. Code, § 711.7, subd. (a))—together with the fact that this role applies to fish in "all waters within the state," whether navigable or non-navigable (*Truckee Lumber*, *supra*, 116 Cal. at pp. 400-401)—

(continued…)

Legislature's determination—consistent with the authority described in article X, section 2—that releasing water to keep those fish below dams in good condition is presumptively reasonable.

The State Water Resources Control Board—which is responsible for administering the State's water resources and preventing the waste and unreasonable use of water (Wat. Code, §§ 100, 174, 275)—has recognized that section 5937 "necessarily implements" article X, section 2's requirement regarding the "reasonable use of water." (*Cal-Trout I*, *supra*, 207 Cal.App.3d at p. 626 [quoting Water Board].) It has explained that section 5937 is both a "legislative expression of the public trust doctrine" and a "legislative determination of reasonableness"—namely, a determination that it is "reasonable to release enough water below any dam to keep any fish that exist below the dam in good condition." (State Water Res. Control Bd., Order WR 95-02 (1995) 1995 WL 59086, p. *4; see also, e.g., State Water Res. Control Bd., Order WR 2024-0007 (2024) 2024 WL 3224084, p. *5 ["Fish and Game Code section 5937 is a legislative expression of the public trust and reasonable use doctrines."].)

The logical corollary of section 5937's reasonable use determination is that it is also presumptively *unreasonable* for a dam owner to divert all water from a river and deprive

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reflects that the public trust doctrine regarding fish is "distinct" from that regarding water resources, even if the two may "overlap." (*Environmental Protection Information Center v. Cal. Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 515; see *Cal-Trout I*, *supra*, 207 Cal.App.3d at p. 630.)

downstream fish of the water they need to survive. That determination is consistent with cases upholding Water Board regulations which confirm that "fish survival is an appropriate consideration in determining what is or is not an 'unreasonable use . . . of water in this state.'" (*Stanford Vina*, *supra*, 50 Cal.App.5th at p. 1003, quoting Wat. Code, § 275; accord *Light*, *supra*, 226 Cal.App.4th at pp. 1482-1485.) It is also consistent with public nuisance cases enjoining activities that killed fish in state rivers (see *ante*, p. 18), which implicitly recognized that such activities were unreasonable. (See *Truckee Lumber*, *supra*, 116 Cal. at pp. 399-402; *Glenn-Colusa*, *supra*, 127 Cal.App. at pp. 35-38; see also Cal. Atty. Gen., Indexed Letter, No. IL 73-48 (Mar. 12, 1973), at pp. 1, 8-9, 13-14 [concluding that section 5937 was "applicable and enforceable" to a diversion dam on the Kern River, and that violation of the statute's "unequivocal" language could be enjoined as a public nuisance].)

The U.S. District Court for the Eastern District of California reached a similar conclusion when it held that the federal government violated section 5937 by allowing no water to pass Friant Dam, leaving "long stretches" of the San Joaquin River "dry most of the time." (*Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906, 924-925 (*Patterson II*)). In explaining why section 5937 was not facially preempted by federal law, the court deemed it "clear" that the "complete diversion of the river, with its concomitant destruction of the historical fisheries, is not reasonable." (*Id.* at p. 919 & fn. 8; *see also id.* at p. 918 ["the Legislature has already balanced the

competing claims for water . . . and determined to give priority to the preservation of their fisheries," quoting *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 201 (*Cal-Trout II*)].)

b. The Court of Appeal below recognized that section 5937 is a statute "concerning the reasonable use of water." (*Bring Back the Kern*, *supra*, 110 Cal.App.5th at p. 351.) The City also agrees that the Legislature has "designated water for fish flows as reasonable through Section 5937." (City ABM 20.) Real parties contend otherwise. They fault section 5937 for not explicitly referencing article X, section 2, and argue that, because the Legislature enacted a version of the statute before the reasonable use doctrine was codified in the state Constitution in 1928, the Legislature "couldn't have possibly meant to invoke constitutional authority that didn't yet exist." (RPI ABM 39-41.)

Real parties misunderstand the nature of legislative authority under article X, section 2 and the California Constitution. "Unlike [under] the federal Constitution, which is a grant of power to Congress," the Legislature "may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the [state] Constitution." (*Methodist Hospital of Sac. v. Saylor* (1971) 5 Cal.3d 685, 691.) Courts therefore "'do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited.'" (*Ibid.*, quoting *Fitts v. Superior Court* (1936) 6 Cal.2d 230, 234.) Here, the Legislature plainly had authority to enact section 5937 to protect fish held in trust by the State (*ante*,

at pp. 17-18), so it had no need—before or after 1928—to "invoke constitutional authority" for the statute (RPI ABM 41).

Real parties are also mistaken in suggesting that enactment of a statute must entirely postdate 1928 to be a legislative determination of reasonable use. Article X, section 2 affirmed the Legislature's authority to "enact laws in the furtherance of *the policy*" of reasonable use. (Cal. Const., art. X, § 2, italics added.) The reasonable use doctrine was well established in the common law before 1928 as a "policy of the law of this state." (*Cal. Pastoral & Agricultural Co. v. Madera Canal & Irrigation Co.* (1914) 167 Cal. 78, 84; see also *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 138, fn. 6 [collecting cases]; Brian E. Gray, *"In Search of Bigfoot: The Common Law Origins of Article X, Section 2 of the California Constitution* (1989) 17 Hastings Const. L.Q. 225, 250-253.) And the Legislature enacted laws regarding reasonable use prior to that date. (See *ante*, p. 19 [discussing, e.g., the Water Commission Act of 1913].)

Regardless, when the Legislature later reenacted and expanded the reach of section 5937 after 1928, it did so knowing that the Constitution now expressly recognized its authority to enact laws determining reasonable use. (See OBM 50-52, citing, e.g., Stats. 1933, ch. 73, § 525, p. 443; Stats. 1937, ch. 456, pp. 1400-1401; Stats. 1957, ch. 456, p. 1399.) And although the Legislature has sometimes referenced article X, section 2 in new statutory enactments (RPI ABM 40-42), there is no requirement that it add such language when reenacting or amending a law that it had previously enacted in furtherance of the underlying

policy of reasonable use. (Cf. *Thompson v. Kerr* (1940) 16 Cal.2d 130, 132 [statute, which did not reference the "initiative power [clause] in the Constitution," was nonetheless enacted "in furtherance of" that power].)

Other post-1928 enactments also confirm that section 5937—and its required release of water for fish below dams—is a statute in "furtherance of the policy" of reasonable use. (Cal. Const., art. X, § 2.) For example, when the Legislature first codified the Water Code, it expressly incorporated the Fish and Game Code chapter governing dams (including section 5937) as provisions "for the protection and preservation of fish in streams obstructed by dams." (Stats. 1943, ch. 368, § 6501, p. 1665; see *Cal-Trout I*, *supra*, 207 Cal.App.3d at p. 600, fn. 4.) And when the Legislature then expressly extended that chapter to dams owned by the United States, it made clear that section 5937 was a component of the State's law "and policy" respecting water resources—which of course includes the cornerstone reasonable use policy in article X, section 2. (Stats. 1945, ch. 1101, § 4, p. 2112, later recodified as Fish & G. Code, § 5902.)

The Legislature has also since confirmed that releasing water for fish protection and enhancement is a "beneficial use" of water under article X, section 2—a proposition no party disputes. (Wat. Code, §§ 1243, subd. (a), 1257, subd. (1); see *National Audubon*, *supra*, 33 Cal.3d at p. 443.) Real parties suggest those later beneficial use statutes raise a negative inference about whether section 5937 itself was enacted in furtherance of the policy of reasonable and beneficial use. (RPI ABM 42.) But as

the Attorney General explained well before those later statutes' enactment, "that the use of water for maintenance of fish life is beneficial" under article X, section 2 could already be "inferred" from section 5937, "which requires the release of water behind dams sufficient in amount to maintain fish life which exists below." (13 Ops.Cal.Atty.Gen. 188, 189 (1949).) The same is true for section 5937's required release of water being a presumptively reasonable water use.

2. The Legislature has authority to enact statewide laws regarding reasonable use

Real parties next contend that if section 5937 represents a legislative determination of reasonable use, the statute is facially unconstitutional under article X, section 2. (RPI ABM 59-64.) The Court should decline to consider this argument because it "'could have been but was not timely raised in the briefs filed in the Court of Appeal.'" (*Lopez v. Ledezma* (2022) 12 Cal.5th 848, 866, quoting *Flannery v. Prentice* (2001) 26 Cal.4th 572, 591.) In fact, real parties expressly "disclaim[ed] any facial challenge to the constitutionality of section 5937" below. (*Bring Back the Kern*, *supra*, 110 Cal.App.5th at pp. 351, 353, fn. 16; RBM 50-51.) But if the Court does consider real parties' facial challenge, it should reject the argument. Real parties identify nothing in the constitutional text, history, or caselaw to satisfy the "exacting" standard required to deem section 5937 facially unconstitutional. (*Taking Offense v. State of California* (2025) 18 Cal.5th 891, 922, quoting *People v. Martinez* (2023) 15 Cal.5th 326, 352.)

As noted above, article X, section 2 "explicitly authorizes the Legislature to 'enact laws in the furtherance of the policy in this

section.'" (*Long Valley*, *supra*, 25 Cal.3d at p. 351, quoting Cal. Const., art. X, § 2.) That language does not limit the Legislature to enacting only "geographically-limited" statutes based on "consideration of a river system's facts and circumstances," as real parties suggest. (RPI ABM 43, 59-62.) To the contrary, a straightforward reading of that "broad language" gives the Legislature significant "discretion as to how to carry out the principles of article X, section 2." (*Los Angeles Waterkeeper*, *supra*, 92 Cal.App.5th at p. 272.) As this Court has explained, "the framers of article X, section 2, recognized that the promotion of its salutary policies would require granting the Legislature *broad flexibility* in determining the appropriate means for protecting scarce water resources." (*Long Valley*, at pp. 351-352, italics added; see also *Modesto Properties Co. v. State Water Rights Bd.* (1960) 179 Cal.App.2d 856, 860 ["it is evident" that if the 1928 amendment's reasonable use policy "was to be made truly effective, it required legislative implementation"].)

The history of article X, section 2 confirms that it does not limit the Legislature to enacting only stream-specific laws regarding reasonable use. As noted above (*ante*, pp. 19-20), the Legislature proposed the 1928 amendment as a "direct response" to this Court's *Herminghaus* decision (*Long Valley*, *supra*, 25 Cal.3d at p. 352), which—among other things—had suggested that the Legislature lacked authority to enact a statute that limited the amount of water any riparian landowner could use for irrigation of uncultivated land. (*Herminghaus*, *supra*, 200 Cal. at pp. 116-118.) In his dissent, Justice Shenk defended the relevant

statute, arguing that the "Legislature has the right in the first instance to prescribe the standards" of reasonable use. (*Id.* at pp. 124-125 (dis. opn. of Shenk, J.).) Relevant here, the statute in question applied statewide, not to a specific geographic area or stream. (See Stats. 1913, ch. 586, §§ 11, 42, pp. 1017-1018, 1033.)

Real parties are therefore correct that article X, section 2—and its express recognition of the Legislature's authority to enact laws regarding reasonable use—"vindicated" Justice Shenk's *Herminghaus* dissent. (RPI ABM 64.) But they are wrong about what that means for their facial challenge and their attempt to eliminate the Legislature's authority to enact statewide laws regarding reasonable use. As the Court of Appeal observed in *Cal-Trout I*, *supra*, 207 Cal.App.3d at p. 625, it would be "iron[ic]" to facially invalidate a legislative determination of reasonable use under a constitutional amendment designed "to vest the 'right' in the Legislature, over the judicial objection in *Herminghaus*," to "enact statutes which determine the reasonable uses of water."

This Court's precedent does not support real parties' facial challenge either. They cite decisions that describe courts' determinations of reasonable use under article X, section 2 as a case- or fact-specific inquiry. (RPI ABM 33-34; see, e.g., *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 706.) But those cases merely stand for the proposition that, "*in the absence of a per se rule* of unreasonableness" (*Stanford Vina*, *supra*, 50 Cal.App.5th at pp. 1003-1004, italics added), a court must "ascertain whether a use of water is unreasonable from the facts and circumstances of particular cases." (*Cal-Trout I*, *supra*, 207

Cal.App.3d at p. 624.) That proposition "does not impel the view that the Legislature has no power to fashion rules concerning reasonableness." (*Ibid.*; accord *Light*, *supra*, 226 Cal.App.4th at pp. 1483-1485.) And the "contrary view is implicit" in this Court's decision in *Joslin*, which held that reasonableness of water use "'cannot be resolved *in vacuo* isolated from statewide considerations,'" including "'policy pronouncements relative to the use and conservation of natural waters.'" (*Cal-Trout I*, at p. 624, quoting *Joslin*, *supra*, 67 Cal.2d at p. 140.)[5]

Real parties also misunderstand this Court's decisions in *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.2d 489, and *Long Valley*, *supra*, 25 Cal.3d 339. (RPI ABM 59-61.) The "serious constitutional question" in those cases was not whether the Legislature could make statewide determinations regarding reasonable use, but whether the Legislature (or Water Board) could "extinguish altogether" and effect a "complete extinction" of future riparian rights. (*Long Valley*, at pp. 344-345, 350, 357-359; see *Tulare*, at pp. 530-531 [statute that effected "complete abandonment" of future riparian rights, after ten years, was contrary to the 1928 amendment that protected both present and prospective riparian rights].)

This Court in *Long Valley* specifically rejected an "expansive reading of the limits *Tulare* places on legislative authority" as

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[5] A court can still consider specific facts and circumstances when reviewing an as-applied constitutional challenge to section 5937 or a similar statute. (*Post*, pp. 39-45.) But a court should do so with appropriate deference to the Legislature's reasonable use determination and policy choices. (*Post*, pp. 46-49.)

"unsupportable in light of the [1928] amendment's grant of authority to the Legislature to enact laws in the furtherance of the constitutionally expressed state water policy." (*Long Valley*, *supra*, 25 Cal.3d at p. 354.) The Court deemed it "clear" that article X, section 2 "enables the Legislature to exercise broad authority" and "does not preclude legislative or administrative determinations" regarding reasonable water use. (*Id.* at pp. 351-352.) And the Court expressly warned that over-reading *Tulare*, as real parties do in this case, would "unduly restrict the Legislature's authority to promote the reasonable and beneficial use of state waters." (*Id.* at p. 354.)

Importantly, real parties' arguments in support of their facial constitutional challenge would "unduly restrict" not only the State's protection of fish in section 5937, but also the Legislature's—and the Water Board's—ability to adopt other statewide rules regarding reasonable use, such as in response to a drought or other emergency. (*Long Valley*, *supra*, 25 Cal.3d at p. 354; see, e.g., Wat. Code, § 1508.5). That result would be contrary to this Court's recognition of the "importance of broad legislative authority for the conservation and regulation of scarce water resources." (*Long Valley*, at p. 352, fn. 6.)

Following this Court's direction in *Long Valley*, the Court of Appeal has likewise held that the legislative authority described in article X, section 2 includes the power to "legislate per se rules of unreasonable use." (*Stanford Vina*, *supra*, 50 Cal.App.5th at p. 1004.) It has recognized that "the Legislature has the power to enact general rules governing the reasonable use of water,"

without limitation or reference to the geographic scope of the regulations at issue. (*Light*, *supra*, 226 Cal.App.4th at p. 1484.)[6]

In fact, the court in *Cal-Trout I* expressly rejected an "implied facial challenge" to Fish and Game Code section 5946 that relied on many of the same arguments real parties raise in their facial challenge here. (207 Cal.App.3d at pp. 593, 622-625.) Section 5946 requires the Water Board to condition permits and licenses on compliance with section 5937 in a region of the State where water appropriations posed a particularly acute threat to fish. (*Id.* at pp. 602, 605.) There, as here, the real party in interest argued that a statute requiring the release of water to protect fish was unconstitutional under article X, section 2 because reasonable use is "an adjudicative question that cannot be constrained by a statutory rule." (*Id.* at p. 622.) But the court found "no preclusion in article X, section 2, of legislative power to make rules concerning what uses of water are reasonable," and observed that the constitutional provision "explicitly assigns to the Legislature the right and obligation to enact laws in furtherance of its policy." (*Id.* at pp. 622, 625.)[7]

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[6] These decisions also recognized the Legislature's ability to delegate similar regulatory authority to the Water Board. (*Stanford Vina*, at pp. 1002-1004; *Light*, at pp. 1483-1485.)

[7] Because section 5946 expressly incorporates section 5937, much of the court's reasoning in *Cal-Trout I* also addressed the latter statute. (E.g., *Cal-Trout I*, at pp. 599-600, 605-606, 622-625; see *Bring Back the Kern*, *supra*, 110 Cal.App.5th at pp. 355 [*Cal-Trout I* concerned the constitutionality of section 5937 "by extension," and at least some of "the reasoning from the *Cal-Trout* cases applies to section 5937"]; OBM 44-49, RBM 18-20.)

Real parties attempt to distinguish *Cal-Trout I* and the other Court of Appeal decisions because the statute and Water Board regulations at issue were geographically limited. (RPI ABM 42-43, 61-62.) But even section 5946—the statute directly at issue in *Cal-Trout I*—would not satisfy real parties' proposed "fact-specific analysis of a stream system" (RPI ABM 20), given that it applies to an entire fish and game district encompassing multiple streams and watersheds across two counties. (See *Cal-Trout I*, *supra*, 207 Cal.App.3d at p. 635 [map in appendix].) Nor was the geographic scope of section 5946 material to the court's analysis of the "'broad legislative authority'" under article X, section 2, which the court concluded was "sufficient to authorize the Legislature to enact statutes which determine the reasonable uses of water." (*Id.* at p. 625, quoting *Long Valley*, *supra*, 25 Cal. 3d at p. 352, fn. 6.) So too in the other Court of Appeal decisions, which did not rely on the regulations' geographic reach when affirming the Legislature's (and Water Board's) authority to legislate "per se" and "general rules" regarding reasonable use. (*Stanford Vina*, *supra*, 50 Cal.App.5th at p. 1004; *Light*, *supra*, 226 Cal.App.4th at pp. 1484-1485.)

Consistent with these decisions, the Water Board in 1975 adopted a regulation implementing section 5937 statewide by requiring that "*all* [new] permits, not just those which pertain to [the district in section 5946], must be conditioned on compliance with section 5937." (*Cal-Trout I*, *supra*, 207 Cal.App.3d at p. 606, fn. 13; Cal. Code Regs., tit. 23, § 782.) In 1974, the Attorney General endorsed the Water Board's authority to adopt this

statewide regulation. (57 Ops.Cal.Atty.Gen., *supra*, at p. 577.) And in the past half century, no party has contended that the regulation is facially unconstitutional under article X, section 2—either because it applies statewide, or on any other ground.

To be sure, *Cal-Trout I* acknowledged that the Legislature's "broad authority" under article X, section 2 is "not unlimited." (207 Cal.App.3d at p. 625.) The court explained that a statute would "transgress the constitution" if it sanctioned a "manifestly unreasonable use of water." (*Ibid.*; see *post*, pp. 46-47.) And the court concluded section 5946 was "manifestly not unreasonable" in "the areas it affects." (*Cal-Trout I*, at pp. 622, 625.)

To support their newly asserted "facial challenge" to section 5937, however, real parties would have to show that requiring the release of water to protect fish below dams is constitutionally unreasonable in "at least the generality or vast majority of cases" statewide. (*Taking Offense*, *supra*, 18 Cal.5th at p. 921, alterations and quotation marks omitted.) They do not—and cannot—make that showing. "[F]ish survival is an appropriate consideration in determining what is or is not an 'unreasonable use.'" (*Stanford Vina*, *supra*, 50 Cal.App.5th at p. 1003, quoting Wat. Code, § 275, and citing Cal. Const., art. X, § 2.) And even the Court of Appeal below acknowledged that releasing "water to keep fish in good condition will often be a reasonable use of water." (*Bring Back the Kern*, *supra*, 110 Cal.App.5th at p. 353.) Real parties identify *no case* finding the release of water for such use to be constitutionally unreasonable on its face, let alone demonstrate that it would be so in the "generality or vast

majority of cases." (*Taking Offense,* at p. 921.) Section 5937 therefore fits comfortably within the "recognized power of the Legislature to pass legislation regulating reasonable uses of water." (*Light*, *supra*, 226 Cal.App.4th at p. 1485.)

B. Section 5937 can be challenged as applied if enforcing the statute at a particular dam would require a manifestly unreasonable use of water

Although section 5937 is facially valid under article X, section 2, the statute may still be challenged as applied. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) This appeal concerns when and how courts should assess whether a particular application of section 5937 violates article X, section 2. As explained below, a party contesting the statute's enforcement bears the burden of raising and proving any as-applied constitutional challenge. And courts should review such challenges with appropriate deference to the Legislature's policy judgment in the statute, finding a constitutional violation only where releasing sufficient water to keep fish below dams in good condition would be "manifestly unreasonable" under the circumstances. (*Cal-Trout I*, *supra*, 207 Cal.App.3d at p. 625.)

1. A party contesting enforcement bears the burden of raising and proving any as-applied constitutional challenge to section 5937

A party wishing to contest the enforcement of a statute under article X, section 2 in a particular case has the "burden of evincing facts to show that it was unconstitutional as applied." (*Associated Homebuilders of Greater East Bay, Inc. v. City of Livermore* (1961) 56 Cal.2d 847, 854.) This follows from the longstanding rule that statutes are presumed to be constitutional

and the "burden of establishing the unconstitutionality of a statute rests on him who assails it." (*Brown v. Superior Court* (1971) 5 Cal.3d 509, 520, quoting *Metropolitan Casualty Ins. Co. v. Brownell* (1935) 294 U.S. 580, 584.) That rule applies whether the party raising a challenge does so as a plaintiff seeking to enjoin a statute's application, or as a defendant seeking to prevent the statute's enforcement. (See *Tobe*, *supra*, 9 Cal.4th at p. 1084, citing *Hale v. Morgan* (1978) 22 Cal.3d 388, 404-405; see also *People v. Fuiava* (2012) 53 Cal.4th 622, 696 [defendant challenging statute's constitutionality carries a "heavy burden"].)

In a case like this, where plaintiffs brought suit to enforce section 5937, the appropriate vehicle for a party to assert an as-applied constitutional challenge to a required release of water would be as an affirmative defense. (See, e.g., *People v. Superior Court* (2019) 34 Cal.App.5th 376, 387, 398-399 [construing real parties' as-applied constitutional challenge as an affirmative defense].) And the party raising that defense must "prove the specific facts giving rise to the alleged constitutional violation." (*Coffman Specialties, Inc. v. Dept. of Transportation* (2009) 176 Cal.App.4th 1135, 1145; see Evid. Code, § 500.) It is "garden variety constitutional law that a party challenging the constitutionality of a law as applied has the burden of 'evincing facts' showing the application is unconstitutional." (*Adoption of T.K.* (2015) 240 Cal.App.4th 1392, 1398, quoting *Associated Homebuilders*, *supra*, 56 Cal.2d at p. 854; see *Stuard v. Stuard* (2016) 244 Cal.App.4th 768, 781, 785 [defendant failed to establish statute was unconstitutional as applied].)

Real parties argue for a different rule. They ask the Court to hold that "plaintiffs bear the burden of proving constitutional reasonableness," and contend that consistency with article X, section 2 should be a "part of a plaintiff's prima facie case" to establish a section 5937 violation. (RPI ABM 68-69.) That is not correct. A plaintiff seeking to enforce a statute need not demonstrate that its application complies with every potentially relevant constitutional provision. Nor do real parties identify any authority suggesting that proving the constitutionality of a statue's application is an element of establishing a violation of that statute.[8] Statutes are taken on their own terms, and the "elements" needed to prove a claim are only those "laid down by the statute." (*People v. Anderson* (2009) 47 Cal.4th 92, 101.)

Here, section 5937's terms are straightforward. A plaintiff seeking to enforce the statute must prove that a dam owner is not allowing "sufficient water" past the dam to keep downstream fisheries in "good condition." (Fish & G. Code, § 5937.) And as discussed above, the mandatory nature of section 5937 already

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[8] None of those cases cited by real parties suggest that "reasonableness is part of a plaintiff's prima facie case" when enforcing a statute like section 5937. (RPI ABM 69.) *National Audubon* involved a challenge to an appropriative water right permit under the common law public trust doctrine. (33 Cal.3d at p. 452.) *Tulare* involved a quiet title action among appropriators. (3 Cal.2d at pp. 502, 548.) Neither were suits to enforce a statute. And *Long Valley* applied the constitutional avoidance doctrine in considering whether a statute authorized the Water Board to "extinguish altogether" future riparian rights in a water rights adjudication (25 Cal.3d at p. 358); it too did not discuss whether a plaintiff must prove as-applied constitutionality when seeking to enforce a statute's plain terms.

reflects a legislative determination that the required releases are presumptively reasonable. (*Ante*, pp. 25-31.) The statute is also "presumed to be constitutional" as applied. (*Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 192.) If a party opposing section 5937's enforcement wishes to rebut those presumptions, it can raise an as-applied challenge as an affirmative defense. But it is that party's burden to "demonstrate" an unconstitutional application based on "the facts of [the] particular case." (*Tobe*, *supra*, 9 Cal.4th at p. 1084.)

Allocating the burden that way makes sense as a practical matter. Dam owners (or real parties in interest) generally have more ready access to information about a river's consumptive water uses and underlying conditions. The City here raises such considerations and analogizes them to defenses of impossibility or impracticability. (City ABM 17-18.) But whether performance of a statutory duty is "impossible, impracticable, or otherwise legally excused are fact-based affirmative defenses" that *the defendant* must "establish[.]" (*Water Audit Cal. v. Merced Irrigation Dist.* (2025) 111 Cal.App.5th 1147, 1187; see *id.* at pp. 1184-1185 [describing defenses to enforcement of section 5935].) Requiring instead that plaintiffs seeking to enforce section 5937 must gather and develop evidence regarding all other water uses—above and beyond the evidence required to establish a violation of the statute—would create a near-insurmountable barrier to its enforcement that is inconsistent with its plain terms. (Cf. *King v. Burwell* (2015) 576 U.S. 473,

498 ["in every case we must respect the role of the Legislature, and take care not to undo what it has done"].)

Real parties' further argument that courts should have a sua sponte duty to assess reasonableness under article X, section 2 (RPI ABM 71-72) is similarly unworkable and inconsistent with basic principles of California procedure. If no party challenges the constitutionality of section 5937 as applied in a particular case, the constitutional challenge is forfeited. (Cf. *Bettencourt v. City and County of San Francisco* (2007) 146 Cal.App.4th 1090, 1101 ["constitutional issues not raised in earlier civil proceedings are waived"].) In such circumstances, the reviewing court need not—and, as a practical matter, could not—assess whether application of the statute is constitutionally reasonable under the particular facts of that case. The imposition of a sua sponte duty would force courts to perform, ad hoc, a potentially complex and resource-intensive analytical step in every case, even when no party has invoked article X, section 2 or "evinc[ed] facts" to show whether section 5937 was "unconstitutional as applied." (*Associated Homebuilders*, *supra*, 56 Cal.2d at p. 854.)

The City makes a similar argument—arguing that a court must always consider all competing water uses on a river whenever applying section 5937—by pointing to the "self-executing" clause in article X, section 2. (City ABM 15-16.) But a "self-executing" constitutional provision is simply one, such as the free exercise clause or due process or equal protection clauses, that "does not *require* legislative implementation" before it can be enforced. (*Prof. Engineers in Cal. Government v. Kempton* (2007)

40 Cal.4th 1016, 1045, italics added.) Here, plaintiffs seek to enforce a statute that *does* implement the applicable constitutional provision (*ante*, pp. 24-28), so the "self-executing" clause in article X, section 2 is largely irrelevant. This Court's decision in *Gin S. Chow* is not to the contrary, as the Fifth Appellate District had suggested below. (See *Bring Back the Kern*, *supra*, 110 Cal.App.5th at p. 351 ["Because section 2 is self-executing, this reasonableness requirement 'must be made effectual in all cases,'" quoting *Gin. S. Chow*, *supra*, 21 Cal. at p. 700].) "All that the reasoning in *Gin S. Chow* connotes is that *in the absence of an a priori rule* a court may ascertain whether a use of water is unreasonable from the facts and circumstances of particular cases." (*Cal-Trout I*, *supra*, 207 Cal.App.3d at p. 624, italics added; see also *ante*, pp. 33-34; OBM 54-57.)

Regardless, the self-executing nature of a constitutional provision does not alter the normal rules of procedure or the burdens that govern as-applied challenges. Holding otherwise would be untenable, given this Court's recognition that "'[e]very constitutional provision is self-executing'" to the extent that "'everything done in violation of it is void.'" (*Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 307, quoting *Oakland Paving Co. v. Hilton* (1886) 69 Cal. 479, 484.) As-applied challenges under self-executing provisions thus still "may be waived by the inaction of the person entitled to exercise such right." (*Chesney v. Byram* (1940) 15 Cal.2d 460, 469.)

Real parties also assert that "a plaintiff seeking a preliminary injunction bears the burden of showing a likelihood

of success on the merits." (RPI ABM 69.) That does not change the above principles either. To obtain a preliminary injunction, the plaintiff must show a "reasonable probability of success on the merits." (*Butt v. State of California* (1992) 4 Cal.4th 668, 693-694.)[9] And a party opposing the injunction can raise affirmative defenses—like an as-applied challenge—to argue the plaintiff is unlikely to succeed on the merits. (See *Aiuto v. City and County of San Francisco* (2011) 201 Cal.App.4th 1347, 1361 [considering statute-of-limitations affirmative defense asserted by defendant].) But it is still the opposing party's burden to raise the defense and present any evidence in support. The preliminary injunction context does not make as-applied constitutionality a part of a plaintiff's prima facie case or require a court to consider the issue sua sponte if no party raises it.[10]

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[9] The plaintiff also must show that the "balance of interim harm" justifies a preliminary injunction. (*Butt*, *supra*, 4 Cal.4th at p. 678.) But the "balance-of-harms analysis" is "not the same" as determining reasonableness under article X, section 2. (*Bring Back the Kern*, *supra*, 110 Cal.App.5th at p. 350, fn. 11; see also RBM 20-21 [discussing *San Luis Obispo Coastkeeper v. County of San Luis Obispo* (9th Cir. 2025) 161 F.4th 590].)

[10] Real parties cite cases (at RPI ABM 72) observing that, before issuing an injunction requiring a "waste of water," courts must consider whether a "physical solution" exists "that will avoid the waste." (*City of Lodi v. East Bay Municipal Utility Dist.* (1936) 7 Cal.2d 316, 339; *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 558-559.) But none of their cases involved a preliminary injunction. (RBM 34.) And for those cases to be relevant here, a party also would first have to demonstrate that a proposed injunction would result in "waste" under article X, section 2, which has not occurred. (RBM 35, fn. 5.)

2. Courts should review as-applied challenges with due deference to the Legislature

Where a party opposing enforcement of section 5937 raises an as-applied constitutional challenge, the court should review that challenge with appropriate deference to the Legislature's policy judgment and determination of reasonable use. This follows from article X, section 2 itself, which recognizes the Legislature's broad authority to "enact laws in the furtherance of the policy" of reasonable use. (Cal. Const., art. X, § 2; *Long Valley*, *supra*, 25 Cal.3d at pp. 351-352.) And section 5937 represents the Legislature's policy determination that requiring dam owners to release water for the health of downstream fish—which the State holds in trust for the benefit of the public—is a presumptively reasonable water use. (*Ante*, pp. 24-31.)

Relying on *Cal-Trout I*, plaintiffs contend that courts reviewing an as-applied constitutional challenge to section 5937 should find a violation of article X, section 2 only where application of the statute to the underlying facts at issue would mandate a "manifestly unreasonable" use of water. (OBM 63-64.) The Attorney General and the Department agree that standard is appropriate. The standard enforces constitutional limits—allowing courts to consider facts and circumstances that could rebut the legislative presumption of reasonable use as applied to a particular dam and river—while also respecting the Legislature's primary role in determining state water policy.

As the Court of Appeal explained when articulating the "manifestly unreasonable" standard in *Cal-Trout I*, "a conflict in public policy between the view of the judiciary and the

Legislature must be resolved in favor of the latter." (207 Cal.App.3d at p. 624.) Where "various alternative policy views reasonably might be held whether the use of water is reasonable within the meaning of article X, section 2, the view enacted by the Legislature is entitled to deference by the judiciary." (*Id.* at pp. 624-625.) The manifestly unreasonable standard helps ensure that courts do not "substitute the[ir] policy view . . . for a reasonable policy enacted in a statute." (*Id.* at p. 625.)

The standard is similar to ones that courts have long applied to avoid judicial second-guessing of the Legislature's policy judgment. For example, courts will not disturb a "legislative determination" under the rational basis test unless the challenged classification is "manifestly unreasonable or arbitrary." (*Rainey v. Michel* (1936) 6 Cal.2d 259, 271.) That test "'sets a high bar' for litigants challenging legislative enactments." (*People v. Hardin* (2024) 15 Cal.5th 834, 852.) "The reasons for this lie at the heart of our democratic system of governance." (*Ibid.*) Real parties provide no valid reason to adopt a fundamentally different approach under article X, section 2. (Cf. *Pacific Rys. Advertising Co. v. Conrad* (1914) 168 Cal. 91, 94-95 [rejecting standard that would allow an improper "substitution of the judgment of the courts for the judgment of the Legislature"].)

Real parties assert that no deference is due to the Legislature's determination of reasonable use because, in their view, article X, section 2 does not afford the Legislature any "broad authority." (RPI ABM 66.) That view is irreconcilable with this Court's decision in *Long Valley*, which—as noted

above—held exactly the opposite: that the 1928 amendment "enables the Legislature to exercise *broad authority*" and that its framers deliberately "grant[ed] the Legislature broad flexibility in determining the appropriate means for protecting scarce state water resources." (25 Cal.3d at pp. 351-352, italics added; accord *Cal-Trout I*, *supra*, 207 Cal.App.3d at p. 625.)

Instead of the deferential "manifestly unreasonable" standard, real parties propose that the Court "draw an analogy from appellate standards of review" and require "de novo" review of whether section 5937's required release of water to protect fish below dams is reasonable in a particular case. (RPI ABM 65-67.) That approach would expressly invite courts to substitute their policy judgment for the Legislature's. And it would improperly treat the Legislature like a lower court rather than a co-equal branch of government—indeed, a co-equal branch *specifically authorized* by article X, section 2 to make difficult policy choices in this context. (Cf. *L.A. County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1114 ["due respect for the power of the Legislature and for the separation of powers" requires the Court to "follow the public policy choices" reflected in statutory enactments].)

A more appropriate analogy would be to reviewing courts' consideration of Water Board regulations regarding reasonable use. The Legislature has delegated authority to the Water Board to prevent unreasonable use. (Wat. Code, § 275; *Long Valley*, *supra*, 25 Cal.3d at p. 351; *Stanford Vina*, *supra*, 50 Cal.App.5th at pp. 1002-1004.) And courts have long recognized that where

the Water Board acts in a legislative capacity, "great deference must be given to the Board's determination." (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 112.) Reasonable use is "essentially a policy judgment requiring a balancing of the competing public interests" (*id.* at p. 130), and in assessing the reasonableness of a Water Board regulation, "'a reviewing court will not substitute its independent policy judgment for that of the agency'" (*id.* at pp. 112-113, quoting *Cal. Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 212; accord *Stanford Vina*, at pp. 1004-1005 [discussing deference to the Water Board, and finding "no basis" to "override the Board's determination that the minimum flow requirements" in a challenged regulation would "prevent an unreasonable use of water within the meaning of article X, section 2"].)

Just as courts properly afford great deference to policy choices made by the Water Board pursuant to its delegated authority regarding reasonable use (see Wat. Code, § 275), so too should courts defer to the Legislature when it enacts statutes that make similar policy judgments. If anything, even greater deference is warranted to the Legislature. (See *Cal-Trout I*, *supra*, 207 Cal.App.3d at p. 632 ["[t]he Legislature, not the Water Board, is the superior voice in the articulation of public policy concerning the reasonableness of water allocation"].)

II. REAL PARTIES' INTERPRETATION OF SECTION 5937 IS NOT PROPERLY PRESENTED AND, IN ANY EVENT, IS MERITLESS

Beyond their facial challenge to section 5937, real parties also press another argument that they concede they did not raise in the Court of Appeal. (RPI ABM 45.) They argue for an

exceedingly narrow interpretation of section 5937 that would limit its application to dams where the owner has been ordered to construct a "fishway"—a "device or structure that facilitates the movement of fish over or around a dam" (*Water Audit*, *supra*, 111 Cal.App.5th at p. 1155, citing Fish & G. Code, § 5931; see RPI ABM 44-58.) As noted above (*ante*, p. 31), the Court generally will not consider an issue that was not raised in the Court of Appeal.[11] But if the Court were to consider real parties' argument, the Court should reject it. Real parties' interpretation contravenes section 5937's plain language and purpose, as well as decades of administrative practice and judicial precedent.

A. The plain text and purpose of section 5937 make clear that it applies to all dam owners, whether or not they are subject to a fishway order

In a "case involving statutory interpretation," the Court's "fundamental task" is to determine the Legislature's intent, beginning "with the plain language of the statute, affording the words of the provision their ordinary and usual meaning." (*Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198.) Here, the plain language of section 5937 unambiguously imposes a mandatory duty on all dam owners—irrespective of whether they are "subject to a fishway order." (RPI ABM 46, 50, 53.)

From the outset, section 5937 expressly applies to the "owner of *any* dam." (Fish & G. Code, § 5937, italics added.)

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[11] The Court's rules also direct parties to identify in their answer to a petition for review any additional issues they wish the Court to consider. (Cal. Rules of Court, rules 8.504(c), 8.516(a)(1), (b)(1)-(2).) Real parties notably did not include this argument in their answer either.

"The term 'any' (particularly in a statute) means 'all' or 'every.'" (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 38; see also *Siskiyou County Farm Bureau v. Dept. of Fish & Wildlife* (2015) 237 Cal.App.4th 411, 430.) The statute also imposes a mandatory duty on these dam owners by providing that they "*shall* allow sufficient water at all times to pass" below their dams. (Fish & G. Code, § 5937, italics added.) The term "shall" is "mandatory." (Fish & G. Code, § 79; see also *Water Audit*, *supra*, 111 Cal.App.5th at pp. 1182-1183; *San Luis & Delta-Mendota*, *supra*, 848 F.3d at p. 1234.) "By its terms," then, section "5937 mandates that the owner of a dam allow water to pass over or through the dam." (*Natural Resources Defense Council v. Patterson* (E.D. Cal. 1992) 791 F.Supp. 1425, 1435 (*Patterson I*).) Nothing in section 5937 conditions this duty on whether the dam owner is separately subject to a fishway order.

In fact, section 5937 goes on to confirm that it applies irrespective of any fishway (or fishway order) by providing that a dam owner "shall . . . *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." (Fish & G. Code, § 5937, italics added.) By imposing a mandatory duty on dam owners "in the absence of a fishway," the provision clearly applies even where a dam owner is not subject to a fishway order. (*Ibid.*) Where the "plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls." (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818.) The

Court should not "go beyond that pure expression of legislative intent." (*Green v. State of California* (2007) 42 Cal.4th 254, 260.)

Real parties offer no convincing explanation for section 5937's "in the absence of a fishway" clause. They suggest that the clause "allows a dam owner to comply with a fishway order by achieving its intended result (downstream flows) without the expense of building a fishway" (RPI ABM 47), and that it applies "if the Commission issues a fishway order but determines that its purpose can be accomplished by releasing flows through some other means (culverts, etc.)" (RPI ABM 53). But these assertions misconstrue the distinct purposes of fishway orders (to allow fish passage over or around a dam) and the water releases required by section 5937 (to provide sufficient flows to keep fish below dams in good condition).

As noted, a fishway is a "device or structure that facilitates the movement of fish over or around a dam." (*Water Audit*, *supra*, 111 Cal.App.5th at p. 1155; accord *Cal-Trout I*, *supra*, 207 Cal.App.3d at p. 606 ["A fishway enables free passage for fish around a dam."].) The Department and the California Fish and Game Commission—two distinct agencies within the California Natural Resources Agency—have authority under sections 5931 through 5934 to issue fishway orders. (See *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205; *Water Audit*, at pp. 1167, 1185-1186.) The purpose of such an order is to allow for "free *passage* for fish over or around any dam." (Fish & G. Code, § 5931, italics added; see also *id.*, § 5932 [authorizing wildlife agencies to construct structures "for the free passage of fish"].)

The purpose of section 5937, by contrast, is to ensure sufficient water flows to protect the health of fisheries below the dam—that is, to keep those fish "in good condition." (See *Cal-Trout I*, *supra*, 207 Cal.App.3d at p. 605.) That purpose may overlap with the purpose of a fishway order, in the sense that a fishway must contain sufficient water to allow for fish passage through it, and the condition of fish downstream will affect their ability to migrate upstream. (*Id.* at p. 606 [noting that fishways and releases under section 5937 are both "for the benefit of fish populations"].) But section 5937's purpose remains distinct: it is to protect the health of fish below the dam, rather than to allow for the passage of fish over or around the dam. That is why section 5937 contains the "in the absence of a fishway" clause and why its second sentence provides that, during minimum flows, the Department may allow dam owners to release water to support fish downstream through a "culvert" or "waste gate"—which, in the context of a dam, are typically designed solely for controlling flow and are not generally suitable for fish passage. (See RBM 39.) Section 5937 thus plainly requires the release of water to keep downstream fish in good condition whether or not the dam has a fishway or is subject to a fishway order.

B. Legislative context and history provide no support for real parties' atextual interpretation

Real parties do not—and cannot—contend that section 5937's plain language supports their narrow interpretation. Nor do they identify any relevant ambiguity in the text that supports their view. Instead, they base their interpretation on "statutory

context and legislative history." (RPI ABM 54.) Neither supports their atextual reading.

1. Real parties' context argument relies on a purported "three-option framework" they derive from sections 5930 through 5942, wherein the Department and the Commission may order a dam owner to install a fishway, build a hatchery, or plant fish. (RPI ABM 44-48.) Real parties contend that section 5937 applies only where the agencies have acted under the first option and ordered a dam owner to install a fishway under sections 5931-5934.[12] There are several problems with real parties' theory.

Most fundamentally, nothing in the text of section 5937—or any other provision invoked by real parties—limits that section to dams subject to fishway orders. Although sections 5931-5934 address fishway orders, section 5937 is a freestanding provision that serves independent purposes and expressly imposes a mandatory duty on dam owners even where no fishway exists. (See *ante*, pp. 50-53.) That is why section 5937 refers to fishways only as one of several "avenue[s] for the release of water from a

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[12] Sections 5931-5934 are not the exclusive means by which a fishway may be installed; dam owners also may voluntarily construct fishways absent an order from the wildlife agencies. And while sections 5935-5936 apply only to dams with a fishway, they are not clearly limited to fishways ordered pursuant to the preceding sections. (See Fish & G. Code, § 5935 ["[t]he owner of *any dam upon which a fishway has been provided* shall keep the fishway in repair and open and free from obstructions," italics added]; *id.*, § 5936 ["[i]t is unlawful to wilfully destroy, injure, or obstruct *any fishway*," italics added]; see also *Water Audit*, *supra*, 111 Cal.App.5th at pp. 1185-1187 [discussing "mandatory nature" of section 5935, irrespective of any exercise of agency discretion].)

dam." (*Cal-Trout I*, *supra*, 207 Cal.App.3d at p. 605.) Section 5937 makes clear that "dam owners must 'at all times' release sufficient water 'to keep in good condition any fish . . . below the dam'"—"whether that is accomplished by means of a fishway *or other means of release*." (*Ibid.*, italics added.)

Further, just as nothing in sections 5931-5934 suggests that section 5937 applies only when a fishway has been ordered pursuant to those provisions, nothing in sections 5938-5942 suggests that section 5937 is inapplicable when a dam owner is ordered to build a hatchery or plant fish below a dam pursuant to those provisions. To the contrary, the statutory scheme makes clear that section 5937 *does* apply in such circumstances. Section 5937 requires a dam owner to release sufficient water to keep in good condition "any fish *that may be planted* or exist below the dam." (Fish & G. Code, § 5937, italics added.) And section 5942 authorizes the Commission to "order the owner of the dam to plant, under the supervision of the department, the young of such fish . . . in such places . . . as the commission may order." (Fish & G. Code, § 5942.) Where those fish are planted below a dam, section 5937 expressly requires the release of water to help ensure their survival. Section 5937 thus plainly applies in circumstances beyond those addressed by sections 5931-5934.

Real parties also fail to explain why they focus on sections 5930-5942 while largely ignoring sections 5943-5948, which fall within the same article of the Fish and Game Code—article 2 of division 6, part 1 of chapter 3, entitled "Dams and Obstructions." Real parties assert that, after section 5930, the "rest of article 2

sets out three regulatory actions the wildlife agencies may take." (RPI ABM 46.) But that statement overlooks the last six provisions, or roughly one-third, of the article—which do not fit neatly into real parties' purported three-option framework.

For example, section 5943 requires dam owners to provide public access for fishing and, like section 5937, applies independent of any fishway, hatchery, or planting order. (See *San Luis Obispo Sportsman's Assn.*, *supra*, 22 Cal.3d at pp. 448-449; see also 53 Ops.Cal.Atty.Gen. 332, 333-338 (1970) [explaining that section 5943 is "mandatory" and "not dependent upon" any action by the wildlife agencies, overruling prior interpretations].) Similarly, sections 5944 (precluding dam owner liability to injured fishermen), 5947 (prohibiting certain water releases that would "destroy fish life"), and 5948 (prohibiting log jams and debris accumulation) also apply irrespective of any actions by the wildlife agencies. These provisions undercut real parties' theory that all provisions within this "Dams and Obstructions" article, including section 5937, must fit within their purported three-option framework.

Section 5946 also defeats real parties' purported contextual interpretation. That provision, as noted above (*ante* pp. 36-37), requires the Water Board to condition certain water rights permits and licenses on compliance with section 5937. Real parties do not dispute that section 5946 applies even in the absence of a fishway order. (RPI ABM 57-58; see *Cal-Trout I, supra*, 207 Cal.pp.3d at pp. 605-606.) They suggest that the provision nonetheless supports their contextual argument

because it "expressly displaces article 2's three-option framework" in one geographic area. (RPI ABM 57-58.) But section 5946 expressly requires the Water Board to condition water rights permits and licenses "upon full compliance *with Section 5937*." (Fish & G. Code, § 5946, subd. (b), italics added.) Real parties never explain how section 5946 could apply in the absence of a fishway order if they were correct that section 5937 itself applies only to dams subject to such an order. Thus, it is real partes, not plaintiffs, that fail to "interpret section 5937 in a manner consonant with section 5946." (RPI ABM 57.)

2. Real parties also lean heavily on legislative history to support their narrow interpretation of section 5937. (RPI ABM 41-57.) But this Court has "consistently stated that when statutory language is clear and unambiguous, resort to the legislative history is unwarranted." (*Bonnell v. Medical Bd.* (2003) 31 Cal.4th 1255, 1264, citing cases.) And here, section 5937's text—which has remained largely the same for almost 90 years—unambiguously applies irrespective of any fishway order. Consideration of legislative history is therefore unwarranted.

Real parties premise their legislative history argument on the assumption that earlier versions of the statute, from 1915 and 1917, required the release of water for downstream fish only where a dam was subject to a fishway order. (RPI ABM 49-51.) At that time, the provisions governing fishway orders and those requiring the release of water for downstream fish appeared together in a single section of the Penal Code. (See Stats. 1915, ch. 491, § 1, p. 820; Stats. 1917, ch. 749, § 1, p. 1524.) In 1933,

however, the Legislature separated that latter requirement into its own section and clarified that it required dam owners to release water from "a fishway" (Stats. 1933, ch. 73, § 525, p. 443)—whether that fishway was installed voluntarily, or pursuant to a fishway order (see *ante*, fn. 12).

What real parties' legislative history entirely fails to show is any indication that the Legislature intended to limit the statute to dams subject to fishway orders *after 1937*—when it added the "in the absence of a fishway" clause. (Stats. 1937, ch. 456, § 1, pp. 1400-1401.) "[S]tatutory language . . . ordinarily is 'the most reliable indicator of legislative intent.'" (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 625, quoting *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) And as discussed above, real parties offer no plausible reading of the "absence of a fishway" clause that could limit the statute's application to dams subject to a fishway order. (*Ante*, pp. 50-53.) Instead, they invoke the principle that a Legislature typically does not hide elephants in mouseholes. (RPI ABM 55-57, citing, e.g., *Whitman v. American Trucking Assns.* (2001) 531 U.S. 457, 468.) But even assuming the statute's application to dams lacking a fishway could be characterized as an "elephant"—which is highly questionable—the Legislature spoke in "clear" rather than "vague terms." (*Whitman*, at p. 468.) For roughly 90 years, then, the provision's plain language has unambiguously applied irrespective of any fishway or fishway order.

C. Real parties' interpretation contravenes decades of administrative practice and judicial precedent

Consistent administrative practice and judicial precedent provide additional reasons to reject real parties' interpretation of section 5937. Limiting the statute to dams subject to a fishway order would represent a radical departure from the shared, decades-long understanding of expert agencies and courts.

Real parties identify no instance from the past 90 years when either the Department or the Commission—the agencies that issue and administer fishway orders—have interpreted section 5937 as applying only to dams subject to such an order. (See, e.g., State Water Res. Control Bd., Decision No. D-893 (1958) 1958 WL 5645, pp. *13, *18 [Department invoking section 5937 without reference to any fishway order]; State Water Res. Control Bd., Decision Nos. A-11281, D-592 (1948) 1948 WL 66518, pp. *1, *3 [same, for the Commission].) Still today, neither the Department nor the Commission construes section 5937 in the manner real parties suggest.[13]

This Court accords "'significant weight and respect to the long-standing construction of a law by the agency charged with its enforcement.'" (*Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1155, quoting *In re Dannenberg* (2005) 34 Cal.4th 1061, 1082.) Here, the Legislature tasked the Department with administering and enforcing the statute (Fish & G. Code, § 702), and the Department has long

[13] Counsel for the Commission reviewed this brief and agrees with the interpretation set forth by the Department and the Attorney General.

understood section 5937 to apply to dams irrespective of any fishway order. The Department has not brought many lawsuits directly enforcing the statute, but it has regularly participated in such cases—like it has done as amicus here—including in cases that applied section 5937 to dams that lack a fishway. (See, e.g., *San Luis & Delta-Mendota*, *supra*, 848 F.3d at p. 1234; Amicus Br., *San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation Dist.*, Case No. 21-55479 (9th Cir. Sept. 22, 2021) 2021 WL 4466575; Amicus Br, *Putah Creek Council v. Solano Irrigation Dist.*, Case No. C025527 (Ct. App. May 21, 1998) 1998 WL 34341373.)[14] And the Department has enforced section 5937 through other means—such as regular participation in Water Board hearings—again, often involving dams that lacked a fishway. (See, e.g., State Water Res. Control Bd., Decision No. 1581 (1982) 1982 WL 17527, p. *6.)

Real parties' reading contravenes not only the Department's "long-standing and consistent" interpretation of section 5937, but also the Attorney General's opinion for at least the last 50 years. (*Busker v. Wabtec Corp.* (2021) 11 Cal.5th 1147, 1166.) Such opinions of the Attorney General are also "'entitled to great weight.'" (*Siskiyou*, *supra*, 237 Cal.App.4th at p. 431, quoting *Cal. Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17.) Here, the Attorney General issued a formal opinion in 1974

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[14] Any prior lack of enforcement by the Department "does not rewrite the statute" in any event, as it could merely "reflect the exercise of prosecutorial discretion or limited resources." (*Water Audit*, *supra*, 111 Cal.App.5th at p. 1185, quoting *Siskiyou*, *supra*, 237 Cal.App.4th at p. 443.)

concluding that section 5937 "clearly should be given a literal interpretation." (57 Ops.Cal.Atty.Gen., *supra*, at p. 582.) That opinion endorsed the Water Board's authority to adopt a regulation conditioning new appropriative water rights permits on compliance with section 5937—irrespective of any fishway or fishway order. (*Id.* at pp. 582-583.)[15]

Consistent with its regulation adopted pursuant to the 1974 opinion (Cal. Code Regs., tit. 23, § 782), the Water Board has regularly applied section 5937 in decisions involving dams not subject to a fishway order. (E.g., State Water Res. Control Bd., Order WR 95-04 (1995) 1995 WL 92133, pp. *10-11, *19-20; State Water Res. Control Bd., Decision No. D 984 (1960) 1960 WL 6709, pp. *3, *6.) And the Water Board has participated as amicus in cases applying section 5937 to dams that lack a fishway. (E.g., *Patterson II*, *supra*, 333 F.Supp.2d at p. 918; *ante*, p. 60 [citing briefs in *San Luis Obispo Coastkeeper* and *Putah Creek Council*].)

Finally, the Department and Attorney General are not aware of any court decision that has ever endorsed real parties' narrow reading of section 5937. To the contrary, as noted above (*ante*, pp. 27-28), a federal court held in long-running litigation

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[15] The 1974 Attorney General opinion disclaimed a 1951 opinion that had construed the statute as not requiring the United States to allow sufficient water past Friant Dam. (18 Ops.Cal.Atty.Gen. 31 (1951).) But even the 1951 opinion did not interpret the statute as applying only to dams subject to a fishway order. And as that 1951 opinion noted, the Division of Fish and Game—a predecessor agency to the Department—interpreted the statute as requiring the release of water from the dam at issue, which lacked a fishway. (*Id.* at p. 37.)

that the federal government violated section 5937 by allowing no water past Friant Dam on the San Joaquin River (see *Patterson II*, *supra*, 333 F.Supp.2d at pp. 924-925)—even though that dam lacked a fishway and was never subject to a fishway order (see *id.* at pp. 909-910 [noting the dam "blocked passage to upstream habitat"]). And as discussed, other courts have likewise consistently interpreted section 5937 as imposing a mandatory duty on dam owners, independent of any fishway or fishway order. (E.g., *Cal-Trout I*, *supra*, 207 Cal.App.3d at pp. 605-606; *San Luis & Delta-Mendota*, *supra*, 848 F.3d at p. 1234 [section 5937 required the federal government to release water to prevent a potential pathogen outbreak in the lower Klamath River].)

III. THE COURT SHOULD RESOLVE THE ISSUES PRESENTED AND REMAND FOR FURTHER SUPERIOR COURT PROCEEDINGS

This Court granted plaintiffs' petition for review to resolve important questions about when and how courts should consider whether application of section 5937 violates article X, section 2. Contrary to real parties' suggestion, there is no reason for the Court to dismiss review. Plaintiffs' petition for review presented the same issues they raised in their merits briefs to this Court. (Compare Pet. 24-31, with OBM 29-72.) In their answer to the petition for review, real parties did not contend that the Court's review of those issues would be improper because of any purported concession or shift in plaintiffs' position. (Compare RPI Answer to Pet. 8-16, with RPI ABM 30-35.) The issues are properly before the Court for resolution. (Cal. Rules of Court, rule 8.516(b)(1).)

Real parties are wrong in suggesting that plaintiffs seek an "advisory opinion." (RPI ABM 39.) An "advisory opinion" is one in which the parties have "no personal interest in the outcome of the litigation" (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 798), or the Court is asked to indicate "'what the law would be upon a hypothetical state of facts'" (*People v. Slayton* (2001) 26 Cal.4th 1076, 1084, quoting *Pacific Legal Foundation v. Cal. Coastal Com.* (1982) 33 Cal.3d 158, 171). Here, the parties remain adverse and have an ongoing stake in the outcome of this litigation. (See *National Audubon*, *supra*, 33 Cal.3d at p. 432, fn. 14.) And the Court's resolution of the issues presented will address the burdens and judicial review standards that will govern proceedings on remand in this very case. (See, e.g., *Tulare*, *supra*, 3 Cal.2d at p. 535 [clarifying the "rule as to the burden of proof" for "the guidance of the trial court"].) There is nothing hypothetical about the issues presented to the Court.

Resolving the issues presented is particularly important here because the Fifth Appellate District's decision is, at best, unclear on those issues. Real parties contend that the Court of Appeal did not decide the relevant burden and deference questions. (RPI ABM 39.) But as the Attorney General and the Department explained in their earlier depublication request, several aspects of the decision can be read as having answered those questions incorrectly. (See AG CDFW Depub. Request 4-7; e.g. *Bring Back the Kern*, *supra*, 110 Cal.App.5th at p. 335 ["under the self-executing provisions of article X, section 2 of the state Constitution, courts must *always* consider reasonableness

whenever adjudicating a use of water," italics added].) Those aspects of the decision will likely cause substantial confusion on remand in this case and in future cases if allowed to remain precedential authority.[16]

In resolving the issues presented, the Court should reverse the Fifth Appellate District's decision and remand to the superior court for further proceedings consistent with this Court's decision. That court will then be able to determine, together with the parties, what additional proceedings may be warranted to implement this Court's decision based on the circumstances and posture of the case at the time of the remand. The Attorney General and the Department agree with plaintiffs (OBM 73-76) that the superior court's preliminary injunction was appropriate based on the facts and arguments before the court at that time, and because "imprecise compliance" with section 5937 is "superior to no compliance." (*Cal-Trout II*, *supra*, 218 Cal.App.3d at p. 207.) By the time this Court issues a merits decision, however, years will have passed since the superior court entered its preliminary injunction. And that injunction—which the court had intended to be in force for only a limited time—has been stayed during the long pendency of this appeal. (OBM 22.)

This Court should reverse and remand with instructions that afford the superior court discretion to determine what next steps may be warranted in the case based on the circumstances

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[16] If the Court were to dismiss review, then, it should at least order depublication of the Court of Appeal's decision. (See Cal. Rules of Court, rule 8.1125(c)(2) [noting that the Court "may order an opinion depublished on its own motion"].)

that exist at that time. On remand, for example, real parties or the City may choose to raise an as-applied constitutional challenge and present evidence that releasing water to keep fish below the dams in good condition would be manifestly unreasonable—something they did not do when opposing the earlier preliminary injunction request. (See *ante*, p. 21.) Plaintiffs also could decide to supplement their own arguments or update the factual record in light of any new circumstances that may exist. And the superior court could reconsider the bond amount accompanying any injunction. (RBM 68.)

This Court's resolution of the issues on which it granted review will govern those remanded proceedings and provide important guidance to other courts considering future cases that address section 5937. For the reasons explained in this brief, the Court should resolve those issues with due deference to the Legislature's determination that dam owners must release sufficient water to keep in good condition downstream fish that the State holds in trust for the benefit of the public.

CONCLUSION

The judgment of the Court of Appeal should be reversed and the case remanded with instructions for the superior court to conduct further proceedings consistent with this Court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached AMICUS BRIEF OF THE CALIFORNIA ATTORNEY GENERAL AND PROPOSED AMICUS BRIEF OF THE CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE uses a 13-point Century Schoolbook font and contains 13,958 words.

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May 4, 2026

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 5/5/2026 by M. Chang, Deputy Clerk

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Supreme Court of California

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Lower Court Case Number: **F087487**

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