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Supreme Court of California
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Case 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 Appellant.

BUENA VISTA WATER STORAGE DISTRICT, et al.

Real Parties in Interest and Appellants

After Decision by The Court of Appeal for the
Fifth Appellate District, Court Case No. F087487

After an Appeal from the Superior Court for the State of California, County of Kern, Case Number BCV-22-103220, The Honorable Gregory Pulskamp

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS; AMICI CURIAE BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The undersigned certifies there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, Rule 8.208.

DATED: May 4, 2026 DOWNEY BRAND LLP

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS

TO: THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA

This Application is submitted by the Association of California Water Agencies ("ACWA"), United Water Conservation District ("United"), and the San Luis & Delta-Mendota Water Authority ("Water Authority") (collectively referred to as "Amici" or "Water Agencies"). Pursuant to Rule 8.520, subdivision (f) of the California Rules of Court, Amici respectfully request leave to file the attached brief of amicus curiae in support of Appellants North Kern Delta Water Storage District, Buena Vista Water Storage District, Kern Delta Water District, Rosedale-Rio Bravo Water Storage District, Kern County Water Agency, and the J.G. Boswell Company ("Appellants").

I.

AUTHORSHIP AND FUNDING

This Brief was drafted on behalf of Amici by Meredith E. Nikkel, Sam Bivins, Nicolas D. Chapman and Bailie Sirhall of Downey Brand LLP, with assistance from their recently retired colleague, Kevin M. O'Brien. No party or counsel for a party in this proceeding authored the proposed amicus brief in whole or in part, or made any monetary contribution intended to fund its preparation or submission. (Cal. R. Ct., Rule 8.520(f)(4)(A).) No

persons or entities other than ACWA made monetary contributions intended to fund the preparation or submission of the proposed amicus brief. (Cal. R. Ct., Rule 8.520(f)(4)(B).)

II.

STATEMENT OF INTEREST

ACWA is the largest statewide coalition of public water agencies in the United States, organized and existing under the laws of California since 1910. ACWA represents approximately 470 member agencies that are responsible for delivering about 90 percent of the water used by California's communities, farms, businesses, and environments. ACWA represents public water management agencies in every sector of water supply, including for municipalities and farms, water recycling, water reuse, wastewater management, groundwater management and stormwater control. ACWA and its members are dedicated to providing a high-quality, reliable water supply to their customers in an environmentally sustainable and fiscally responsible manner.

The Water Authority is a joint powers authority serving twenty-seven member agencies, twenty-five of which contract with the United States for water supply from the federal Central Valley Project. The Water Authority delivers water to the most diverse set of member agencies in California. The member agencies provide water to approximately 1.2 million acres of

agricultural lands within areas of San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito, and Santa Clara Counties; nearly two million people, including those in urban areas of Santa Clara County referred to as the Silicon Valley; and more than 90,000 acres of managed wetlands and wildlife refuges within the largest contiguous wetland west of the Mississippi River.

United is a California special district organized and existing under the laws of the State of California, with responsibility for managing, conserving, and enhancing water resources within its 214,000-acre service area in Ventura County. United operates and maintains surface water and groundwater supplies for agricultural, municipal, and environmental uses, including through operation of the Santa Felicia Dam and management of groundwater recharge and extraction programs within the Santa Clara River Valley.

Amici have determined that this appeal involves issues of vital importance to the prudent management of water resources in California. Specifically, the foundation of California water law as embodied in Article X, section 2 of the California Constitution ("Article X, section 2") would be severely undermined if the use of water to keep fish in "good condition" under Fish & Game Code section 5937 ("Section 5937") were deemed to be presumptively reasonable without regard to the impacts on other uses of water

in a state with highly variable and inadequately-distributed water resources. Reasonableness under Article X, section 2 is not something that can be established by legislative fiat.

III.

AMICI CAN ASSIST THE COURT IN DECIDING THIS MATTER

The Water Agencies are uniquely qualified to assist the Court in this appeal because of their collective experience managing highly variable water resources on behalf of diverse constituencies. From the deserts of southwest California to the Sacramento-San Joaquin Delta to the densely populated coastal areas to the forests of the North Coast, the Water Agencies and their members share a vital interest in the reasonable and efficient use of water. They know firsthand that the conditions prevailing in this state require that determining whether a use of water is reasonable must be made on a case-by-case basis. What is reasonable for some water agencies due to their geography, climate, hydrology or water demand may be unreasonable for others. Exempting flows under Section 5937 from the inherently fact-intensive analysis required by Article X, section 2 would adversely affect all California water agencies and their customers, which include California residents, cities, disadvantaged communities, farms, native tribes, and businesses.

Respectfully submitted,

DATED: May 4, 2026 DOWNEY BRAND LLP

By: _____
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I.

INTRODUCTION

The story of the development of California and western water law is the story of adaptation. California's natural condition—characterized by highly variable regional climates and hydrology—requires such adaptability and flexibility. Nearly three-quarters of the State's precipitation falls in the northern-most third of the State, while nearly three-quarters of water demand occurs in the lower two-thirds. Available surface water supplies peak in late spring, while peak demands occur in the late summer. And California is no stranger to multi-year droughts and devastating floods that pose existential threats to ecosystems, water utilities, and residents alike.

The Water Agencies represent the water resource managers and distributors who support families, businesses and habitats across the state. As such, the Water Agencies are invested in ensuring that the constitutional rule of reasonable use is made effectual in every water allocation decision. Indeed, the constitutional rule of reasonable use stated in Article X, section 2, is the overarching, cardinal rule of California water resources law. It declares that "because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable . . . ." (Cal Const., Art. X, § 2.)

For this reason, all uses of water are restricted to the amount of water "reasonably required for the beneficial use served." (*Ibid.*; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443 ("*Audubon*") ["All uses of water, including public trust uses, must now conform to the standard of reasonable use."].)

A simple reality of the conditions prevailing in this state is that all uses of water compete for scarce supplies. Recognizing this reality, this Court's precedents uniformly hold that when making water allocation decisions, Article X, section 2 requires trial courts and the State Water Resources Control Board ("State Water Board") to consider the reasonableness of a specific beneficial use under the totality of the circumstances, including the beneficial use's effect on competing beneficial uses. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1242 ["what is a reasonable use of water depends on the circumstances of each case," quoting *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 139]; *Tulare Irr. Dist. v. Lindsay Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 567 ["What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and need."]; *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 706 ["what is an unreasonable use is a judicial question depending on the facts in each case."]; *Imperial Irrigation Dist. v. State Water Resources Control Bd.* (1990) 225 Cal.App.3d 548, 570 [rejecting

argument that "all 'beneficial' uses are by definition 'reasonable'" because Article X, section 2 "[o]bviously . . . requires a comparison of uses."].) Moreover, this fact-specific determination cannot be resolved "in vacuo, isolated from state-wide considerations of transcendent importance." (*Joslin*, *supra*, 67 Cal.2d at p. 140.) This determination cannot be static because "[w]hat constitutes reasonable use is dependent upon not only the entire circumstances presented but varies as the current situation changes." (*Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 194.) Amici urge this Court to affirm the long-standing fact-specific approach to evaluating the reasonableness of all water uses.

The constitutional mandate of reasonable use has become even more important in the face of climate change and other emerging challenges to water supply. Amici and their members face immense challenges in meeting the water needs of the state's diverse mix of water users, including cities, farms, businesses, native tribes, and the environment. Disadvantaged communities—both within cities and in rural areas—are often especially affected by water supply and water quality problems due to limited capability to finance physical solutions. Climate change has exacerbated these water supply and water quality challenges.[1]

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[1] The effects of climate change on California's water resources

Because of their first-hand knowledge of how the "conditions prevailing in this state" demand careful consideration of the tradeoffs inherent in allocating scarce water resources, Amici support Appellants' arguments in this appeal. This case should be remanded to the trial court with direction that the court undertake a reasonableness analysis in accordance with Article X, section 2 before ruling on Plaintiffs' and Respondents' ("Plaintiffs") request for a preliminary injunction. This analysis must consider all the relevant facts and circumstances the State of California and the Water Agencies' members routinely consider in managing the state's water resources, including, but not limited to, the physical setting, competing uses of water, the nature, abundance, and value—ecological and economic—of the fish species Plaintiffs seek to protect, and the impacts of the requested injunction on other water uses and the local economy.

---

have been succinctly described by the California Department of Water Resources:

> Climate change is having a profound impact on California's water resources, as evidenced by greater weather extremes, reduced snowpack, higher sea level, and changes in river flows. Models predict that more precipitation will fall as rain instead of snow, exacerbating flood risks and creating additional challenges for water supply reliability. These impacts are expected to intensify in the future.

Amici's Motion and Request for Judicial Notice ("RJN") at Ex. A [*Climate Change Program*].

II.

THE CONDITIONS OF THE STATE

In addition to the facts described in Appellants' brief, a broader factual background is at play in this appeal: "the conditions prevailing in this state." (Cal. Const., art. X, § 2.) Precipitation differs dramatically throughout California; exceeding 140 inches along the North Coast, yet below four inches in the inland deserts of the southwest. (RJN at Ex. C [Cal. Water Plan Update 2023 Supporting Document Water Portfolio and Balances at p. 3].) Most precipitation falls in the winter and early spring (RJN at Ex. D [Northern Sierra 8-Station Historical Precipitation]), yet the highest demands for water are in the summer and fall (RJN at Ex. E [*Climate Change Basics*].) Approximately 75 percent of the available water originates north of Sacramento, while 80 percent of the demand occurs in the southern two-thirds of the state. (RJN at Ex. F [*The California Water System*].) Put simply, there is a mismatch between geographic and temporal supply and demand in our state.

California's complex system for the distribution and use of water is designed to address "the conditions prevailing in this state." (Cal. Const., art. X, § 2.) This system depends in large part on dams that capture rainfall and snowmelt during the winter and spring and store millions of acre-feet of water. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 691–93

[describing the Central Valley and State Water Projects].) Beyond the Central Valley and State Water Projects, Amici and their members also own, operate, and depend on dozens of local water storage systems that conserve rainfall and snowmelt. Federal, state, and local projects alike release this conserved water at carefully considered times for both instream uses and deliveries that sustain California communities, farms, businesses and the environment. (RJN at Ex. B, pp. 3-2 – 3-8 ("Cal. Water Plan Update 2023").)

Climate change presents water managers with difficult decisions. Snowpack—the keystone of California's overall water storage—has been significantly reduced as precipitation increasingly falls as rain, or the snow that does fall melts earlier in the season. (*Id.* at p. 2-2.) California residents face increased costs as water agencies strive to construct new projects to protect reduced surface water supplies. And the costs to fund these new projects—paid by the consumer via water rates due to the constitutional limitations on public agency revenues and appropriations—disproportionately affect disadvantaged communities. (RJN at Ex. G [*Assessing Early Implementation of Urban Water Use Efficiency Requirements*] [noting that disadvantaged communities are disproportionately affected by water use rates and fees levied by public entities].)

III.

ARGUMENT

This case turns on the foundational principle of California water law: because of the "conditions prevailing in this state," Article X, section 2 universally requires that all uses of water be reasonable under a totality-of-the-circumstances test. (*City of Barstow*, *supra*, 23 Cal.4th at p. 1242.) Plaintiffs' position—that Section 5937 establishes a presumptively reasonable use that supersedes this constitutional limitation—cannot be reconciled with Article X, section 2's plain language, its history, or a near-century of interpretive precedent. The Court should reject Plaintiffs' proposed constitutional exemption for Section 5937 and reaffirm that reasonableness must be determined through a holistic, case-specific inquiry that considers competing demands on scarce water resources. Any other outcome would impose rigid mandates that could result in reallocations of water without regard to redirected impacts, local conditions, existing uses, or impacts on municipal supply, agriculture, ecosystems, and groundwater management.

To avoid this result, this Court should also provide clear direction regarding the factors the trial court should consider in evaluating the reasonableness of Plaintiffs' proposed injunction. At minimum, the trial court should consider the physical setting in which the injunction would be implemented; the impacts on

other users and wildlife, the local economy, and disadvantaged communities; and the needs and value of the fish that would purportedly benefit from the proposed injunction.

A. The Constitution Demands Consideration of All Uses of Water.

Plaintiffs assert that the Legislature has determined that "[k]eeping enough water in the river to maintain fish is presumptively reasonable, and therefore required, under the statute." (Pls. Opening Br. at p. 49, ("Pls. Br.") citing *Cal. Trout, Inc. v. Superior Court* (1989) 207 Cal.App.3d 585, 625.) But Article X, section 2's plain meaning and this Court's precedent provide that no one use is above the constitutional prohibition on waste and unreasonable use as a "presumptively reasonable" use of water. This Court should reject Plaintiffs' position and affirm the Court of Appeal's decision.

1. The Constitutional Requirement of Reasonable Use Arises from a Rejection of Dogmatic Principles that Prevent Maximum Utilization of Water.

The constitutional rule of Article X, section 2 broadly rejected dogmatic principles upheld by this Court in 1926 that would have prevented the conservation and maximum utilization of this state's water resources. (*Herminghaus v. Southern Cal. Edison* (1926) 200 Cal. 81.)

In *Herminghaus*, this Court upheld an injunction against a proposed water storage and hydroelectric project on the San Joaquin River in favor of a downstream riparian's existing use of the natural flow of the river to flood and passively irrigate her riparian grazing lands. (*Herminghaus*, *supra*, 200 Cal. 81 at pp. 123, 127–28 (dis. opn. Shenk, J.).) The riparian right holder relied on nearly the entire river's flow to convey the miniscule percentage of that flow to irrigate the riparian land. (*Id.* at pp. 123–25 (dis. opn. Shenk., J.).) This Court held that riparian rights were not subject to the common law doctrine of reasonable use that was applicable to appropriative water rights at the time. (*Id*. at pp. 100–103.) Thus, according to *Herminghaus*, a riparian could demand a stream's entire flow, even if they only needed a small part of it for beneficial uses. (*Id.* at pp. 123–25 (dis. opn. Shenk., J.).)

The public backlash against such wasteful and inefficient use was the impetus for the constitutional amendment now set forth in Article X, section 2. The inflexible water allocation sanctioned by *Herminghaus* prevented a water storage and hydroelectric facility that would have conserved water for use later in the year during periods of high demand. (*Herminghaus*, *supra*, 200 Cal. at pp. 109–11.)

This background is key to understanding why the voters responded with the expansive language of Article X, section 2,

which applies to rights to water in "*any* natural stream or water course in this State." The clear intent of this language affirms the proclamation "that the conditions prevailing in this state"—the geographic and temporal mismatch between supply and demand—require maximum conservation and utilization of all water. (Cal. Const., art. X, § 2.)

Article X, section 2 exists today in the same form as when it was approved by the voters nearly 100 years ago. (See generally, Bezerra, California Water Law (2022) at pp. 157–88 [summarizing history of Article X, section 2].) This Court has characterized its provisions as the "highest and most solemn" expression of the people of the state on behalf of the general welfare, and has held that the "present and future well-being and prosperity of the state depend upon the conservation of its life-giving waters." (*Gin S. Chow*, *supra*, 217 Cal. at p. 701). Article X, section 2 shifted the jurisprudential foundation of California water law by establishing a doctrinal framework that emphasizes optimal utilization of the State's precious water resources. (H. Dunning, The Physical Solution in Western Water Law (1986) 57 U. Colo. L. Rev. 445, 458.) Consistent with this framework, "all uses of water, including public trust uses, must now conform to the standard of reasonable use." (*Audubon*, *supra*, 33 Cal.3d at p. 443.)

2. Reasonableness Applies to All Beneficial Uses and Priorities.

Plaintiffs' arguments conflate "reasonable use" with "beneficial use" and "priority." (See *Imperial Irrigation Dist.*, *supra*, 225 Cal.App.3d at p. 570 [explaining that not all beneficial uses are reasonable].) These three terms have distinct legal meanings in water rights law. At bottom, a water right is the right to reasonably use water for application to a beneficial use. (*People v. Shirokow* (1980) 26 Cal.3d 301, 307.) Beneficial use thus refers to the end use of the water, whether it be beneficial uses like irrigation, municipal and industrial, and domestic uses, or instream uses. There is no dispute that the Legislature can establish "beneficial uses." For example, Water Code section 1243 provides that "[t]he use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water."

Similarly, the Legislature has established that certain beneficial uses have higher "priority" as a matter of policy. These are not "priorities" as that term relates to curtailments during shortage. (See, e.g., *City of Barstow*, *supra*, 23 Cal.4th at p. 1243 [discussing relationship between different types of water rights].) Rather, Chapter 1 of Division 1 of the Water Code contains numerous declarations of state water policy that, among other things, prioritize uses. (Wat. Code, §§ 100–113.) For example,

Water Code section 106 states that domestic use is the highest use, followed by irrigation.

Reasonable use, however, is the overarching restriction applicable to all beneficial uses of water, regardless of benefit or legislative prioritization. (*Audubon*, *supra*, 33 Cal.3d at pp. 443, 447 n. 30; see also *Imperial Irrigation Dist.*, *supra*, 225 Cal.App.3d at 570.) Even the "highest" priority of domestic use is not immune from Article X, section 2; a domestic user cannot waste water or use it unreasonably simply because their use is highly prioritized.

B. No Use of Water Is Presumptively Reasonable.

As a self-executing constitutional provision, Article X, section 2 is the "supreme law of the state, which the courts are bound to enforce, and it must be made effectual in all cases" regarding the allocation of water resources. (*Gin S. Chow*, *supra*, 217 Cal. at p. 700.) The Court of Appeal correctly found that the trial court did not make Article X, section 2 effectual in this case. (*Bring Back the Kern v. City of Bakersfield* (2025) 110 Cal.App.5th 322, 356–57.)

Plaintiffs argue that the Legislature has already applied Article X, section 2 by enacting Section 5937 in furtherance of Article X, section 2, and as a result, this Court must defer to that reasonableness determination. (Pls. Br. at pp. 39–47.) According to Plaintiffs, Section 5937 furthers the policy of Article X, section

2 by establishing a presumptively reasonable use—the release of water from dams in sufficient quantities to keep fish in "good condition." (*Id*. at p. 49.). Only where the release of water is "manifestly unreasonable" would Section 5937 yield to Article X, section 2. (*Id*. at p. 47.)

This construction of Article X, section 2 is untethered from the plain meaning of the constitutional language. Article X, section 2's text does not contemplate elevating any particular use as more reasonable than others. Rather, it provides that, due to the conditions prevailing in this state,

> the right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such 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.

(Cal. Const., Art X, § 2, emphasis added.) Article X, section 2's plain meaning establishes a hardline requirement for all consumptive and non-consumptive beneficial uses of water: no more than "reasonably required." (*Ibid*.) Thus, it prohibits legislative carveouts for any beneficial use. Plaintiffs' "manifestly unreasonable" standard has no basis in Article X section 2's plain meaning and must be rejected.

Reasonableness is not something that can be established by

legislative fiat as mere legislation cannot alter the terms of the Constitution. The Constitution limits legislative power and prevents the Legislature from passing laws that violate its principles. (*County of Riverside v. Super. Ct.* (2003) 30 Cal.4th 278, 285 ["we also must enforce the provisions of our Constitution and 'may not lightly disregard or blink at a . . . clear constitutional mandate.'" (quoting *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1252 [omission in original])].) Plaintiffs' argument that the legislature determined that flows under Section 5937 are presumptively reasonable contravenes the "clear constitutional mandate" (*ibid.*) apparent in Article X, section 2—that reasonableness varies with the circumstances. (*Lindsay-Strathmore Irr. Dist.*, *supra*, 3 Cal.2d at p. 597 ["What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and need."].) Thus, Article X, section 2 mandates an "individual court's ad hoc, de novo rebalancing" (Pls. Br. at p. 53) of reasonableness under Section 5937—or any other statute.

C. A Holistic, Fact-Specific Analysis is Required to Determine Reasonableness.

Determining reasonableness under Article X, section 2 is an inherently fact-specific analysis. This analysis may be "difficult, [but] it does not follow that it cannot be done. The

requirements of public welfare demand that it be done." (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 375.)[2]

Determining reasonableness requires considering the totality of the circumstances, including the effect of the proposed use on competing uses. (*City of Barstow*, *supra*, 23 Cal.4th at 1242; *see also Long Valley*, *supra*, 25 Cal.3d at p. 354 [holding statutory adjudication framework furthers Article X, section 2 by considering competing past, present and future uses]; *Joslin*, *supra*, 67 Cal.2d at pp. 140–41 [holding use of water to passively transport gravel unreasonable in light of competing demands for water conservation project]; *Lindsay-Strathmore Irr. Dist.*, *supra*, 3 Cal.2d at pp. 567–74 [holding that a reasonableness analysis should consider customary uses and methods of diversions]; *Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1192 [holding whether a particular use is reasonable requires assessing competing uses].)

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[2] California courts and the State Water Board have a duty to conduct this analysis. (*See Gin S. Chow*, *supra*, 217 Cal. at p. 706 ["what is a reasonable or unreasonable use is a judicial question to be determined in the first instance by the trial court"].). Specifically, this duty applies in water right permitting (*Environmental Defense Fund, Inc.*, *supra*, 26 Cal.3d 183), adjudicating water rights to a stream (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 354 ("*Long Valley*")), and in allocating water quality responsibilities (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 144).

The necessity of a case-specific and flexible approach to reasonableness was echoed by an influential commission of California's sharpest minds in water law and policy nearly fifty years ago. (RJN at Ex. H, p. 1 [Final Report of the Governor's Commission to Review California Water Rights Law (1978) at p. 1] ("Final Report").) Then-Governor Edmund G. Brown, Jr., established the Commission to Review California Water Rights Law in 1977 in response to a severe drought. (*Ibid.*) The Commission developed seven reports analyzing various topics and recommending legislative and regulatory fixes. (*Id.* at p. 3.) This Court has often cited the work of the Commission in water cases. (See, e.g., *Long Valley*, *supra*, 25 Cal.3d pp. 354–56 [citing the Final Report's recommendations for statutory adjudications of stream systems].)

In making recommendations to increase water use efficiency, the Commission emphasized the benefits of enforcing the constitutional requirement of reasonableness through regulatory action and litigation rather than legislation. (Final Report at pp. 50–72.) The Commission noted that "neither the courts nor the Legislature have comprehensively defined" Article X, section 2's reasonableness requirement. (Final Report at p. 57.) While the "Legislature has selected certain, isolated uses, such as instream beneficial uses, for classification as beneficial uses," the courts have applied the Constitution's reasonableness

requirement on a case-by-case basis. (*Ibid.*) The Commission concluded that "further clarification of the requirement should continue to be left for treatment by the courts on a case-by-case basis." (*Ibid.*) This is because what is a reasonable use varies based on numerous factors specific to the use, including the region, hydrologic conditions, and societal impacts. (*Ibid.*; see also *Joslin*, *supra*, 67 Cal.2d at pp. 140–41.) "Therefore," the Commission determined, "any reasonable beneficial use standards adopted by the Legislature would be overly rigid." (Final Report at p. 57.) Importantly, the Commission did not suggest that Section 5937 or any other statute declared any particular use presumptively reasonable.

The Commission's recommendations are on point in this appeal. The trial court is best positioned to determine whether requiring Kern River instream flows to support a fishery are reasonable under Article X, section 2 because it can weigh the evidence and consider the totality of the circumstances in that specific case. Evidentiary hearings, judicial or administrative, protect the procedural due process rights of those affected by water allocation decisions. (See, e.g., *California Water Curtailment Cases* (2022) 83 Cal.App.5th 164, 196 [noting that the State Water Board's authority to make water right determinations requires process]; *United States*, *supra*, 83 Cal.App.3d at p. 101 ["it is . . . axiomatic that once rights to use

water are acquired, they become vested property rights."]; RJN at Ex. M, pp. 34–39 (*California Water Curtailment Cases*, Final Statement of Decision, Phase 1 Trial (Santa Clara County Super. Ct., Apr. 3, 2018, JCCP No. 4838) [holding State Water Board's drought curtailment orders violated due process]).) Amici and their members rely on such proceedings to ensure decisionmakers have a full record on which to base their decisions, including their application of Article X, section 2. (See, e.g.*, In the Matter of the Diversion and Use of Water From Big Bear Lake and Bear Creek in San Bernardino County by Big Bear Municipal Water District and Bear Valley Mutual Water Company* (State Water Resources Control Bd., Feb. 16, 1995, Order WR 95-04) ("WRO 95-4"); *see also infra* at III.D.) And these determinations can be revisited in the future if the facts warrant, because reasonable use may change as society and "prevailing conditions" change.

D. The State Water Board Has Already Required a Fact-Specific Reasonableness Analysis to Flows Under Section 5937.

It is noteworthy that the State Water Board, the state agency with jurisdiction to evaluate whether water use complies with Article X, section 2 (*Environmental Defense Fund Inc.*, *supra*, 26 Cal.3d at p. 198), conducted a reasonableness analysis in resolving a complaint based on Section 5937. (WRO 95-4 at p. 2.) While not binding on this Court, decisions and orders of the

State Water Board are persuasive authority and should be given careful consideration. (*See United States*, *supra*, 182 Cal.App.3d at p. 130 [acknowledging the State Water Board's "special knowledge and expertise" in applying Article X, section 2].)

In WRO 95-4, California Trout, Inc. ("Cal Trout") filed a complaint before the State Water Board alleging that the Big Bear Municipal Water District's operation of Bear Valley Dam and Big Bear Lake in San Bernardino County violated Section 5937. (WRO 95-4 at p. 2.) Significantly, the State Water Board rejected a presumptively-reasonable approach based on the *CalTrout*[3] cases and instead ascertained the reasonableness of Cal Trout's proposed instream flow regime under the totality of the circumstances. (*Id.* at pp. 23–34.) Specifically, it considered the impacts of the releases proposed by Cal Trout on existing uses of Big Bear Lake and Bear Creek and the lake levels needed to maintain those uses. (*Id.* at pp. 24–34.) The State Water Board also considered the impacts of proposed instream flows on the local tourism-dependent economy. (*Id.* at pp. 28–29.) WRO 95-4's analysis is instructive and better harmonizes the inquiry required by Article X, section 2 with that of Section 5937.

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[3] *Cal. Trout, Inc v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585; *Cal. Trout, Inc. v. Super. Ct.* (1990) 218 Cal.App.3d 187.

E. This Case Must Be Remanded to the Trial Court for a Determination of the Reasonableness of Plaintiffs' Proposed Releases of Water for Fish.

Article X, section 2 requires the trial court, before ruling on Plaintiffs' motion for preliminary injunction, to determine of whether the proposed use is reasonable considering the totality of the circumstances, including the effect of the proposed use of water on all competing uses in light of the "limited water resources available to the state." (*Imperial Irrigation Dist.*, *supra*, 225 Cal.App.3d at p. 570.) In other words, proving a violation of Section 5937 requires a showing that the amount of water needed to keep fish in "good condition" is reasonable under the circumstances. This Court should direct the trial court to consider the following factors on remand.

1. Reasonableness in the Context of Current Conditions.

The determination of reasonableness under Article X, section 2 "cannot be resolved in vacuo isolated from state-wide considerations of transcendent importance." (*Joslin*, *supra*, 67 Cal.2d at p. 140.) This Court in *Joslin* admonished that "paramount among" such statewide considerations is the "ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in [Article X, section 2]." (*Ibid.*) As society's needs require water

resources to be used more efficiently, what is reasonable under the Constitution can change. (See *Audubon*, *supra*, 33 Cal.3d at p. 447, fn. 28 [recognizing that Article X, section 2 may require the "optimum allocation of water."].)

Accordingly, what is considered a reasonable use in one time and place may be an unreasonable use in another. (*Lindsay-Strathmore Irr. Dist.*, *supra*, 3 Cal.2d at p. 547 [citing *Joerger v. Pacific Gas & Electric Co.* (1929) 207 Cal. 8].) For example, this Court refused to deem the unlined canals at issue in *Lindsay-Strathmore Irrigation District* unreasonable because they were customary at the time and place of the litigation. (*Id.* at pp. 572–73.) But years later, both the State Water Board and the court of appeal determined that unlined canals in the arid Imperial Valley were unreasonable in view of the need to conserve more water. (*Imperial Irrigation Dist.*, *supra*, 225 Cal.App.3d at pp. 561–62, 570–71). The flexibility and adaptability promoted by a fact-specific reasonableness analysis is vital to Amici's members, who must manage water for farms, communities, and wildlife in conditions ranging from the relatively rainy to the arid.

2. The Physical Conditions in the Kern River Watershed.

The trial court must consider the climate, hydrology, and physical reality of the Kern River system as a whole. The upper segment of the Kern River originates just below Mount Whitney

in the Sierra Nevada mountains, and flows into Lake Isabella Reservoir and Dam, then down into the San Joaquin Valley floor. (8 AA 1796 [map]; 11 AA 2356 at 3:17–26 [describing Kern River hydrology].) The Kern River's flow, like most rivers originating in the Sierra Nevada, varies widely from season to season and year to year. (11 AA 2332 [describing flows as "highly variable"]; 11 AA 2357 at 4:12–14 [describing annual flows as varying from 2.5 million acre-feet to 139,000 acre-feet].) And like most rivers originating in the Sierra Nevada, the Kern River's peak flows are derived from snowmelt and occur in late spring or early summer, before irrigation demands reach their zenith. (8 AA 1798–1804 [showing peak flows between April and June].)

The trial court must also reconcile whether the Kern River's hydrology can actually maintain the flows demanded by Plaintiffs at the location demanded by Plaintiffs. The evidence in the record shows that the high flow event that resulted in fish below certain weirs was highly anomalous, and may not be possible during most years. (11 AA 2350.) These facts are key to considering the reasonableness of Plaintiffs' demanded allocation.

These considerations are not unique to the Kern River. ACWA's members operate across widely divergent hydrologic regions and must manage that variability in real time to meet agricultural, municipal, and environmental demands. A rule that disregards region-specific hydrologic realities would impair Amici

and their members' ability to prudently manage their supplies.

3. The Nature, Abundance, and Environmental Value of the Fish Species at Issue.

It is paramount that the trial court consider the totality of the circumstances involving the fish species and population at issue. At a minimum, this requires that the trial court assess the extent and quality of evidence indicating that the proposed flows will have a beneficial effect for the fish in question based on habitat metrics such as the timing, amount, and temperature of the flows. And the court must consider the feasibility of attaining those habitat metrics in the context of the watercourse and whether there are alternative, more efficient means to achieve the same goals. (*City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 341–44 [directing trial court to "work[] out a physical solution" so "as to prevent an unreasonable waste of the waters of the stream."].)

Additionally, this analysis requires considering whether the fish to be protected is a native species. (See, e.g., Fish & Game Code, § 6902, subd. (a) ["It is the policy of the state to significantly increase the natural production of salmon and steelhead trout"].) Invasive species dominate numerous California waterways and imperil native species. (RJN at Ex. I, pp. 5.3-22 [California State Wildlife Action Plan 2025].) Indeed, "many non-native fish species have become established in

California, dominating many of the rivers and streams" in the State, and they "outcompete native fish for food or space, prey on native fish (especially in early life stages), change the structure of aquatic habitats . . ., and may spread diseases . . . ." (*Id.* at pp. 5.3-22–23.) While Section 5937 may apply broadly to fish existing below a dam, Article X, section 2 requires courts to weigh the reasonableness of sustaining those specific fish. Dedicating scarce surface water to sustain an abundant, non-native predator species at the expense of human communities, agriculture, and native ecosystems presents a vastly different constitutional balancing calculation than protecting a fragile native species.

Moreover, even some native species of fish exist throughout the state in great abundance and have little or no ecological or economic value. Disproportionate reductions in water supply for competing uses to maintain or enhance such native fish populations may be unreasonable on stream systems where water is scarce or intermittent, particularly if the statewide condition of the species in question is healthy. Indeed, it appears that the species at issue in this appeal—largemouth bass and California hitch—exist in great abundance. (5 AA 1137.)

Finally, the trial court should also consider the impact of higher instream flows on other species. (See *San Luis Obispo Coastkeeper v. County of San Luis Obispo* (9th Cir. 2025) 161 F.4th 590, 601 [court must consider flow regime's harm on other

listed species before issuing injunctive relief].) In a recent decision reviewing an injunction issued under the federal Endangered Species Act and Section 5937, the Ninth Circuit Court of Appeals held that courts must weigh evidence on all affected ESA-listed species before issuing a mandatory injunction. (*Ibid.*) This is because "[h]abitats are complex. Species are interconnected. Sometimes, what looks harmful to one species in the short term may benefit it, or others, in the long run." (*Ibid.*) The Ninth Circuit recognized that a myopic focus on one species can carry adverse consequences on other species that depend on the same water source. (*Ibid.*) While not binding on this Court, the Ninth Circuit's thoughtful reasoning is highly persuasive.

A full assessment of the relative status and value of **all** species that could be affected by an injunction under Section 5937 is critical to prudent water management. Amici and their members must often balance environmental objectives with essential human uses, and the ecological value, regulatory status, and actual need for protection of particular species directly inform those decisions. A regime that compels water releases without regard to whether the species at issue is abundant, non-native, or otherwise of limited ecological significance would distort that balance, diverting scarce water resources away from both the provision of reliable water supplies to communities and

the protection of truly imperiled species.

4. The Impacts of the Proposed Injunction on Other Water Users in Kern County.

Consideration must be given to competing demands for water. (*Long Valley*, *supra*, 25 Cal.3d at p. 354; *Joslin*, *supra*, 67 Cal.2d at p. 140.) This analysis must, at a minimum, consider the reasonableness of the Appellants' competing uses for Kern River flows. (*Ibid*.) This includes the redirected impacts that reducing surface water supplies may have on other sources of water because reasonableness cannot be ascertained "in vacuo." (*Joslin*, *supra*, 67 Cal.2d at p. 140.) The trial court must be directed to conduct a holistic analysis.

Surface water supplies in California are at a premium. Many watercourses are designated "fully appropriated stream systems" by the State Water Board, and thus no more water is available for new appropriations. (See generally, *In the Matter of the Declaration of Fully Appropriated Stream Systems in California* (State Water Resources Control Bd., Nov. 19, 1998, Order WR 98-08).) Additionally, the passage and implementation of the Sustainable Groundwater Management Act ("SGMA") (Wat. Code, § 10720 et seq.) prompted groundwater demand management actions that reduce the availability of groundwater resources, elevating the importance of surface water supplies. A mandatory injunction reallocating water resources is bound to

cause redirected impacts on water supplies within the region.

Like Appellants, Amici and their members are water users whose interests must be accounted for in any reasonableness determination. They supply water to tens of millions of Californians, support businesses and agricultural production that sustain regional economies, and are increasingly responsible for implementing groundwater sustainability mandates under SGMA. Mandating reallocations of surface water without considering interconnected demands risks intensifying groundwater overdraft, increasing costs, and destabilizing carefully calibrated supply portfolios. Article X, section 2 requires that these system-wide consequences be evaluated, not ignored. To that end, the trial court must consider evidence regarding how reductions in surface water supplies on the Kern River will impact agricultural, domestic, municipal, and environmental uses of water alike. For example, it may be impractical or infeasible for municipalities to satisfy demands when facing diminished supplies because many municipalities in California have already adopted and implemented rigorous water efficiency measures. (Cal. Water Plan 2023 Update at p. 4-2 [describing urban and agricultural water use efficiency policies as "very effective."].)

5. The Impacts on Disadvantaged Communities.

The trial court must also consider the impacts of restricting

surface water on disadvantaged communities. Many Kern River water users—like many of ACWA's members—provide water for domestic use to customers within their service areas that include disadvantaged communities. (11 AA 2345, 2349, & 2351.) Reductions in Kern River surface water would increase reliance on imported supplies or groundwater, both of which can be costly and present "water supply concerns for disadvantaged communities." (11 AA 2351 [declaration of Steven Taglia.].) Purveyors who supply disadvantaged communities must often "deepen their groundwater wells, which causes water quality issues and increases the costs to extract groundwater." (*Ibid.*) Additionally, many groundwater sustainability agencies are considering costly groundwater extraction charges to manage demands on depleted aquifers. (See Wat. Code, §§ 10730.2, 10730.4, & 10730.6.) All of these costs are borne by the end customer, disproportionately affecting low-income and disadvantaged communities. (RJN at Ex. G.) A reasonableness analysis that entirely bypasses or otherwise fails to meaningfully account for these consequences would undermine the constitutional mandate to promote the general welfare and would impose inequitable burdens on the very communities most vulnerable to water supply disruptions. The trial court must consider these impacts on remand.

6. The Impacts to the Economic Development of the State.

One of the "statewide considerations of transcendent importance" (*Joslin*, *supra*, 67 Cal.2d at p. 140), is the effect of the proposed water use on "appropriations essential to the economic development of this state." (*Bring Back the Kern*, *supra*, 110 Cal.App.5th 322, 357, quoting *Audubon*, *supra*, 33 Cal.3d at p. 445.) Amici and their members play a central role in sustaining the economic infrastructure of the state, including the agricultural and municipal systems that depend on reliable water supplies. Their ability to deliver water buttresses not only local economies but also statewide economic stability. Reallocating water away from established beneficial uses without a careful assessment of economic impacts will compound existing pressures from SGMA compliance and water scarcity, with cascading effects on employment, food production, and regional resilience. Article X, section 2 demands a balancing that accounts for these broader economic consequences, not a rule that elevates one use to the detriment of all others.

The trial court must consider the effect on appropriations for irrigation beneficial uses. Agriculture is Kern County's economic engine. "Kern County consistently ranks among the top five most productive agricultural counties in the entire United States." (RJN at Ex. J [Kern County Local Area Profile].) The

agricultural economy is the single largest employer of Kern County residents. (RJN at Ex. K [Kern County Employment Data].) The groundwater demand-management actions undertaken to meet SGMA's requirements are already projected to disproportionately affect disadvantaged communities that depend on agricultural jobs. (RJN at Ex. L, p. 33 [Expert Report of Richard Howitt, PhD, on behalf of Semitropic Water Storage District, *In the Matter of Kern Subbasin Probationary Hearing* (State Water Resources Control Bd., Feb. 20, 2025)].) The trial court must assess whether the volume of flow Plaintiffs seek to keep instream is reasonable considering the impact of removing that flow from what could be used for irrigation, particularly if it may exacerbate existing socioeconomic challenges for disadvantaged communities.

As the United States Supreme Court has held, the use of water for instream flow "must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." (*Schodde v. Twin Falls Land & Water Co.* (1912) 224 U.S. 107, 121, quoting *Basey v. Gallagher* (1874) 87 U.S. 670, [holding reasonable use can change as society's needs change].)

IV.

CONCLUSION

The Court should affirm the Court of Appeal and hold that Article X, section 2 of the California Constitution requires a holistic, case-specific inquiry on the reasonableness of all uses of water that considers competing demands on scarce water resources. This case should be remanded to the trial court with direction to undertake such an inquiry, including consideration of the factors identified in this brief and in Appellants' brief.

Respectfully submitted,

DATED: May 4, 2026 DOWNEY BRAND LLP

By: _____

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DATED: May 4, 2026

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(c), the undersigned certifies that the 30 pages that constitute the amici curiae brief for the Association of California Water Agencies, United Water Conservation District, and San Luis Delta-Mendota Water Authority contains 6,632 words (including footnotes but not caption page, Certificate of Interested Entities or Persons, Application for Leave to File Amici Brief, signature blocks, or Motion for Judicial Notice), as counted using the word count feature of Microsoft Word, and that this document uses proportionally spaced typeface and a 13-point font consistent with the Rule of this Court.

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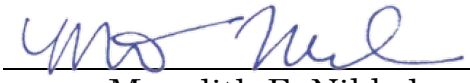
By: 

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PROOF OF SERVICE

Bring Back the Kern et al. v. City of Bakersfield Case No. S290840

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 621 Capitol Mall, 18th Floor, Sacramento, CA 91505-4681.

On May 4, 2026, I served true copies of the following document(s) described as

1. APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS; AMICUS CURIAE BRIEF

2. MOTION FOR JUDICIAL NOTICE; DECLARATION OF MEREDITH E. NIKKEL; PROPOSED ORDER

3. PROOF OF SERVICE (this document) on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept

service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 4, 2026, at Sacramento, California.

Deanna Fillon

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Hon. Gregory A. Pulskamp
Metro Justice Building - Division J
1215 Truxtun Avenue
Bakersfield, CA 93301

Trial Judge
Case No. BCV-22-103220
Via U.S. Mail

Supreme Court of California
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Case Name: **BRING BACK THE KERN v. CITY OF BAKERSFIELD (NORTH KERN WATER STORAGE DISTRICT)**
Case Number: **S290840**
Lower Court Case Number: **F087487**

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5/4/2026

Date

/s/Meredith Nikkel

Signature

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