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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, et al.,
Defendants and Respondents.

Appeal from Fifth Appellate District, Case No. F087487 (lead),
Bring Back the Kern, et al. v. City of Bakersfield, et al.
After Appeal from Judgment of the Kern County Superior Court,
Case No. BCV-22-103220
Hon. Gregory Pulskamp Presiding

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF FOR THE BAY AREA COUNCIL AND SAN MATEO ECONOMIC DEVELOPMENT ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST NORTH KERN WATER STORAGE DISTRICT, ET AL.; [PROPOSED] AMICI CURIAE BRIEF

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AMICI CURIAE THE BAY AREA COUNCIL AND SAN MATEO COUNTY ECONOMIC DEVELOPMENT ASSOCIATION

APPLICATION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST AND APPELLANTS NORTH KERN WATER STORAGE DISTRICT, BUENA VISTA WATER STORAGE DISTRICT, KERN DELTA WATER DISTRICT, ROSEDALE-RIO BRAVO WATER STORAGE, KERN COUNTY WATER AGENCY, AND THE J.G. BOSWELL COMPANY

Pursuant to Rule 8.520, subdivision (f), of the California Rules of Court, amici curiae The Bay Area Council ("the Council") and San Mateo County Economic Development Association ("SAMCEDA"), respectfully request leave to file the attached Amici Curiae Brief ("Brief") in support of Real Parties in Interest and Appellants North Kern Water Storage District, Buena Vista Water Storage District, Kern Delta Water District, Rosedale-Rio Bravo Water Storage, Kern County Water Agency, and The J.G. Boswell Company ("Real Parties") in the above-captioned proceeding (*Bring Back the Kern, et al. v. City of Bakersfield* [No. S290840]) filed by Plaintiffs and Respondents Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, Center for Biological Diversity, and Water Audit California ("Plaintiffs") against Defendant and Respondent City of Bakersfield ("the City").

I. AUTHORSHIP AND FUNDING

This Brief was drafted by Christina L. Berglund and Bridget K. McDonald of Remy Moose Manley, LLP, on behalf of amici curiae. No party nor counsel for a party in the pending case authored the Brief in whole or in part, or made any monetary contribution intended to fund its preparation or submission. (Cal. Rules of Court, rule 8.520, subd. (f)(4).)

II. STATEMENT OF INTEREST

The Council is a business-sponsored, public policy advocacy association representing more than 330 of the largest companies and civic organizations across the nine-county San Francisco Bay Area. Since its formation in 1945, the Council has focused on the intersection of business and leadership to advocate for making the Bay Area the world's most innovative, globally competitive, inclusive, and sustainable region. The Council works to identify challenges, conduct research, promote collaboration, and implement policy solutions to improve the Bay Area's economy, quality of life, and future. As part of these efforts, the Council prioritizes policy initiatives related to: water, energy, and climate; housing; homelessness; transportation; and public safety. To further these initiatives, the Council and its members plan and facilitate public and private projects involving residential and commercial developments, transportation, water supply infrastructure, and wastewater treatment.

With respect to these initiatives, the Council also monitors litigation of concern and identifies cases that may influence the Bay Area. This is one of those cases. As the accompanying Brief explains, the issues raised in this case threaten to disrupt the Bay Area's planning and development efforts, causing long-term uncertainty while harming the region's ability to develop critically needed affordable and accessible housing.

The Council has a direct interest in the outcome of this case because the legal principles governing water allocation and the interpretation of Fish and Game Code, section 5937 ("Section

5937"), could have profound local, regional, and statewide implications. Specifically, if the Court adopts the Plaintiffs' reading that Section 5937 supersedes or constrains the constitutional doctrine that the State's water resources must be put to "reasonable and beneficial" use, it would unsettle decades of carefully balanced water policy, disrupt regional water management systems, and ultimately curtail the reliability of water supplies essential for housing, economic activity, and environmental stewardship throughout the Bay Area and greater California.

Founded in 1953, SAMCEDA promotes business issues that enhance and sustain the economic prosperity of the San Mateo County region and its local communities. SAMCEDA utilizes open dialogues, educational campaigns, and direct advocacy strategies to engage national, state, regional, and local officials on policy issues. SAMCEDA provides its members with access to valuable information and research on a timely basis regarding budgetary and fiscal stability with the state, regional and local jurisdictions, policy initiatives on various topics, including housing, education, workforce development, technology, environment, healthcare, land use/zoning, and economic development that directly impact how business is conducted.

III. ISSUES ON WHICH AMICI CURIAE SEEK TO ASSIST THE SUPREME COURT

The California Constitution is the supreme law of the State. All statutes, including the Fish and Game Code, must be interpreted consistently with its provisions. Article X, Section 2 of

the California Constitution establishes the bedrock principle that water use in the State must be both *reasonable* and *beneficial*. Within this framework, the State must balance competing needs—including those for domestic, municipal, agricultural, industrial, and environmental uses.

Plaintiffs' argument that Fish and Game Code, section 5937, independently mandates particular flows in the Kern River—regardless of any balancing for reasonable and beneficial uses—is incompatible with this constitutional structure. To elevate Section 5937 above the Constitution would invert the hierarchy of California law and destabilize water governance statewide. Such an interpretation would set a precedent that enables single-purpose statutory claims to override the comprehensive balancing required under Article X, Section 2. The result would be regulatory fragmentation, proliferation of litigation, and significant uncertainty in the State's ability to plan for new housing, climate resilience, and economic development—all of which depend on predictable water allocations.

Amici curiae aim to aid this Court's review of these issues by providing broader public policy considerations on Plaintiffs' novel and unprecedented interpretation of Section 5937. The intent of this Brief is to aid in the Court's consideration of whether Section 5937 can be construed to supersede or displace Article X, Section 2's requirement that water be put to reasonable and beneficial use in a manner that balances the needs of all water users, including domestic uses allocated for critically

needed housing. Amici curiae have examined the parties' merits briefs and are familiar with the issues argued therein. Amici curiae thus respectfully request that the Court grant them leave to file the Brief included with this application.

Respectfully submitted,

Dated: May 4, 2026

REMY MOOSE MANLEY, LLP

By: /s/ *Christina L. Berglund*

CHRISTINA L. BERGLUND
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I. INTRODUCTION

In California, two scarcities abound: water and housing. For decades, the Legislature, judiciary, and citizenry have sought to balance the competing demands for these two resources to ensure they can be equitably accessed and distributed throughout the State. In 1928, the citizenry amended California's Constitution to declare that the State's general welfare requires water resources to be put to the most beneficial and reasonable use. (Cal. Const., art. X, § 2.) Nearly a century later, recognizing that California faces a housing supply and affordability crisis of "historic proportions", the Legislature declared that the "availability of housing is of vital statewide importance." (Gov. Code, §§ 65589.5, subd. (a)(2)(A), 65580, subd. (a).) These mandates, however, do not exist in a vacuum. Instead, they task local and regional municipalities, along with State agencies, with considering the needs of their constituents and the surrounding environment. This necessarily requires balancing tandem and competing needs to determine how best to serve the public's interest.

Amici curiae Bay Area Council ("the Council") and San Mateo County Economic Development Association ("SAMCEDA")

submit this brief in support of Real Parties in Interest and Appellants North Kern Water Storage District, Buena Vista Water Storage District, Kern Delta Water District, Rosedale-Rio Bravo Water Storage, Kern County Water Agency, and The J.G. Boswell Company ("Real Parties") to further emphasize that Article X, Section 2, remains the ultimate arbiter of California's water resources in the context of Fish and Game Code section 5937. The Council and SAMCEDA acknowledge and respect the need to protect the State's fragile in-flow habitats and resident fish species. That interest, however, must still be balanced with the public's interest in a safe and accessible supply of water and housing. (See Wat. Code, §§ 100, 106.)

Rather than balance these interests, Plaintiffs and Respondents Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, Center for Biological Diversity, and Water Audit California ("Plaintiffs") invite the Court to adopt a categorical rule under Fish and Game Code, section 5937 ("Section 5937") that would improperly thwart the California Constitution, destabilize statewide water policy, and exacerbate the State's ongoing housing crisis. This Court should reject Plaintiffs' interpretation of Section 5937 and affirm its longstanding position that the reasonable use doctrine under Article X, Section 2 governs all water use throughout the State. In enacting Section 5937, the Legislature did not implicitly balance competing water uses to ultimately elevate instream water for fish over water for off-stream domestic and municipal purposes. To hold otherwise would subject water allocations

relied upon by municipalities to significant uncertainty, which would in turn undermine the State's integrated water supply management framework and jeopardize investment in and construction of much-needed housing. Because Article X, Section 2's framework was designed to prevent this type of conflict, the Council and SAMCEDA respectfully request that the Court uphold the Fifth District Court of Appeal's decision and the requisite balancing that the Constitution demands.

II. ARGUMENT

A. The "reasonable use" framework established by Article X, Section 2 of the California Constitution is the necessary filter within which Fish and Game Code, section 5937, must be interpreted.

"[W]ater is a tremendously valuable resource in California and … it is the continuing duty of the state to ensure that the water is best used to meet the needs of the state and of the people as a whole." (*Casitas Mun. Water Dist. v. U.S.* (Fed. Cl. 2011) 102 Fed.Cl. 443, 459.) As such, "[c]onservation of water and reliability of the water supply are matters of significant public interest and are of 'transcendent importance.'" (*Central and West Basin Water Replenishment Dist. v. Southern Cal. Water Co.* (2003) 109 Cal.App.4th 891, 903 (*SoCal Water*).)

The California Constitution furthers these goals by mandating that all the State's water resources be used reasonably and beneficially. (Cal. Const., art. X, § 2.) Plaintiffs, however, urge differently. They contend no such balancing is required in this instance because the Legislature already did so

when enacting Section 5397 to elevate instream water for fish over competing off-stream uses, despite legislative declarations to the contrary. (Joint Opening Brief of Plaintiffs and Respondents ["Plaintiffs' Opening Brief"], pp. 39–62; see Wat. Code, § 106.) Plaintiffs' interpretation of Section 5937, however, would improperly elevate one beneficial use (instream water for fish) over others (e.g., domestic and municipal water supplies for housing Californians), in turn thwarting the Constitution, along with the decades of water law jurisprudence and the Legislature's explicit directive to develop more housing. (See Gov. Code, §§ 65589.5, subd. (a)(2)(A), 65580, subd. (a).)

1. As the supreme law of the State, the reasonable use doctrine under Article X, Section 2 governs all uses of water throughout the State.

The California Constitution is "the paramount authority" to which the Legislature and State agencies "must yield." (*City and County of San Francisco v. Regents of Univ. of Cal.* (2019) 7 Cal.5th 536, 558; accord Answer Brief On The Merits of Defendant and Respondent City of Bakersfield ["City's Answer Brief"], p. 15.) Article X, Section 2 provides:

> It is hereby declared 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, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.

(Cal. Const., art. X, § 2.) This Court has recognized that this provision requires "***[a]ll*** uses of water…[to] now conform to the standard of reasonable use." (*National Audubon Society v. Super. Ct.* (1983) 33 Cal.3d 419, 443 (*Audubon*), emph. added.)

In keeping with this precedent, the Fifth District correctly recognized that, as the supreme law of the State, this constitutional mandate is self-executing. (*Bring Back the Kern v. City of Bakersfield* (2025) 110 Cal.App.5th 322, 335 (*BBTK*), citing *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 700 (*Gin Chow*).) As a result, Section 2's "independent force of law requires a consideration of reasonableness." (*Id.* at p. 352; *Gin Chow*, *supra*, 217 Cal. at p. 700 [Section 2's reasonableness requirement "must be made effectual in all cases"].)

The Court of Appeal's reasoning supports this Court's repeated affirmance that, because Article X, Section 2 "appl[ies] to every water right and every method of diversion", "no one can acquire a vested right to the unreasonable use of water." (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367; *Audubon*, *supra*, 33 Cal.3d at p. 443, fn. 23, citing *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 145.) Accordingly, any statute concerning water management—including those enacted under the Fish and Game Code—must be read in harmony with and in furtherance of this constitutional standard. (See *Modesto Properties Co. v. State Water Rights Bd.* (1960) 179 Cal.App.2d 856, 859–860 (*Modesto Properties*) ["the fundamental policy of reasonable use and conservation set out in the Constitution is not limited solely to the water flowing in natural streams, water

courses, channels, etc., but that the policy encompasses the use of all of the water within the State"]; *BBTK*, *supra*, 110 Cal.App.5th at p. 351 ["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"].)

2. Section 5937 does not displace the required balancing of beneficial uses under Article X, Section 2.

Section 5937 of the Fish and Game Code serves an important environmental purpose: it requires dam owners to maintain sufficient water flows in and around their dams to support downstream fish habitats. (Fish & G. Code, § 5937.) This requirement, however, is only one component of the broader legal mosaic governing the management of the State's water resources. (See, e.g., Wat. Code, §§ 1201, 1243.5, 1253.) The overarching provisions of Article X, Section 2 frame this mosaic by requiring that all water be used reasonably and beneficially. (See Cal. Const., art. X, § 2; Wat. Code, § 1050; *Modesto Properties*, *supra*, 179 Cal.App.2d at p. 860 [in enacting the Water Code, "the Legislature intend[ed] to devise a plan which was commensurate in scope with the constitutional amendment," such that the amendment encompasses "the use of all of the water within the state"]; accord *SoCal Water*, *supra*, 109 Cal.App.4th at pp. 904–905.)

While the Legislature "has the power to enact general rules governing the reasonable use of water," "what is reasonable use

or reasonable method of use of water is a question of fact to be determined according to the circumstances in each particular case." (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1484; *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 750.) This case-specific inquiry exists alongside the Constitution's recognition that "the Legislature may also enact laws in the furtherance of the policy in this section contained." (Cal. Const., art. X, § 2.) Accordingly, the Legislature may structure how the Article X, Section 2 inquiry is carried out in particular contexts.[1]

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[1] For example, the Sustainable Groundwater Management Act ("SGMA") (Wat. Code, § 10720 et seq.) expressly reflects the Legislature's intent that local management of groundwater occur "consistent with rights to use or store groundwater and Section 2 of Article X of the California Constitution." (Wat. Code, §§ 10720.1, subd. (b), 10720.5, subd. (b).) To that end, SGMA establishes a structured, public process for developing and reviewing groundwater management decisions—including how to address competing uses. SGMA delegates to groundwater sustainability agencies ("GSAs") the duty to develop and implement groundwater sustainability plans ("GSPs") to avoid "undesirable results" within the basins they manage. (Wat. Code, §§ 10727.2, subd. (b)(1), 10721, subds. (v), (x)(1)–(4) [listing "undesirable results" as including "chronic lowering of groundwater levels," "reduction of groundwater storage," "seawater intrusion," and "degraded water quality"], 10727.8 [requiring public notice and opportunities for interested parties to participate in GSP development and implementation].) Those determinations are subject to review and approval by the Department of Water Resources (Wat. Code, § 10727.2; Cal. Code Regs., tit. 23, §§ 354.24, 354.26) and may be challenged through statutory validation proceedings (Wat Code, § 10726.6, subd. (a); Code Civ. Proc., § 863). In this way, the Legislature, through SGMA, has structured the Article X, Section 2 inquiry as a defined regulatory process for evaluating and balancing

There is, however, no evidence that Section 5397 was enacted "in the furtherance" of the 1928 constitutional amendment, as Plaintiffs assert. (See Plaintiffs' Opening Brief, pp. 13–14 [maintaining that, under Section 5937, "the Legislature has already 'balanced' competing interests and mandated protection for fish"]; see *id.*, pp. 35, 40; see also City's Answer Brief, pp. 39–44; Cal. Const., art. X, § 2.)

Moreover, foregoing this balancing test would mean the demands of environmental uses (here, the amount of water relevant fish might need) would always prevail over the demands of human and domestic uses—despite the Legislature's and this Court's urging to the contrary. (See *Audubon*, *supra*, 33 Cal.3d at p. 446 ["Now that the economy and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm public trust uses"]; Wat. Code, §§ 100, 106 ["It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water"].)

Thus, when properly read, Section 5937 complements—rather than displaces—the Article X, Section 2 inquiry. It reflects the Legislature's intent that, when balancing reasonable uses of water, agencies (and courts) should consider protecting in-stream uses for fish and wildlife as *one* of many beneficial uses. (See 18

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competing beneficial uses, with the resulting agency determinations informing—and arguably warranting deference in—subsequent judicial review.

Ops.Cal.Atty.Gen. 31, 37–38 (1951) [concluding that the former iteration of Section 5397 "is not a reservation of water for the preservation of fish life, but is rather a rule for the operation of dams where there will be enough water below the dam to support fish life, i.e., it is a standard for the release of water in excess of what is needed for domestic and irrigation purposes so that what is available for fish life shall not be wastefully withheld"][2].) The management of the Kern River, consistent with applicable water rights, local supply obligations, and ecological commitments, falls squarely within this framework. (See Wat. Code, § 106; see generally *BBTK*, *supra*, 110 Cal.App.5th at pp. 335–339.)

To construe the statute otherwise would transform this single legislative provision into an implied constitutional amendment—something no court, agency, or legislative branch

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[2] In 1974, the Attorney General published an opinion that concluded the State Water Resources Control Board ("the Water Board") had general authority to adopt a proposed regulation that, at the time, largely mirrored today's iteration of Fish and Game Code, section 5946. (57 Ops.Cal.Atty.Gen. 577 (1974).) As proposed, the regulation would condition the Water Board's issuance of new water permits and licenses on the requirement that it consider whether the appropriator must allow the passage of water through a dam for preserving fish below. The opinion explained that the Water Board's powers and duties allowed it to consider the preservation of fish and wildlife values when acting upon new water appropriation applications. This authority, however, rests on the Water Board's broader discretion to consider such factors and make decisions based on policy, not on the independent force of the Water or Fish and Game Codes. Thus, while the Water Board may enforce Fish and Game Code, section 5937 by adopting corresponding regulations, it has no statutory duty or obligation to do so.

has the power to unilaterally do. (See *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 625 [the Legislature cannot enact "a statute [that] sanctioned a manifestly unreasonable use of water" for doing so would "transgress the constitution"]; accord *BBTK*, *supra*, 110 Cal.App.5th at pp. 353–354, fns. 17–18 [explaining that "section 2 prevents the Legislature from sanctioning a 'manifestly unreasonable use of water', such as "a situation where fish could *only* be kept in good condition by devoting the *entire* watercourse to fish flow at the expense of all human use of water[,]…[including] insufficient drinking water for humans" (emph. orig.)].)

Interpreting Section 5937 as compelling the dedication of water solely to one purpose—fish habitat—without regard to reasonableness or competing beneficial uses, as Plaintiffs urge, would be inconsistent with Article X, Section 2, and the Legislature's express policy of comprehensive water resource management. (Wat. Code, § 100; see 18 Ops.Cal.Atty.Gen. 31, 37–38 [rejecting contention that former iteration of Section 5397 had "the effect of reserving from any other uses the water necessary to propagate fish" as this "would contravene, fundamental principles of the law of waters"].)

B. Plaintiffs' reading of Section 5397 would jeopardize critically-needed housing development throughout the State.

Plaintiffs' construction of Section 5397 would nullify the constitutional balancing that ensures water is equitably allocated

among all users and uses—including for urban, agricultural, environmental, and recreational purposes. (*Joslin*, *supra*, 67 Cal.2d at p. 140 ["what is a reasonable use of water depends upon the circumstances of each case, such an inquiry cannot be resolved in vacuo from statewide considerations of transcendent importance"]; accord *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 194.) This, in turn, would vitiate this Court's holding that, when balancing competing water demands, in-stream needs are not entitled to automatic priority over other beneficial uses. (*Audubon*, *supra*, 33 Cal.3d at p. 447, fn. 30.)

The resulting uncertainty would have direct consequences for housing development throughout the State. By displacing the established framework for allocating water among competing uses, Plaintiffs' interpretation would inject instability into the reliability of water supply allocations. This would chill investment and impede the issuance of project entitlements and building permits that depend on reliable water supplies, thereby jeopardizing the State's ambitions to redress its ongoing housing affordability and accessibility crisis—a goal the Legislature has deemed of "vital statewide importance." (Gov. Code, § 65580, subd. (a); see also *id.*, § 65589.5, subd. (a)(2)(A).)

1. California confers its citizens with a human right to water by prioritizing domestic and municipal uses as the highest and best uses of water.

In California, every human has the right to safe, clean, affordable, and accessible water adequate for human

consumption, cooking, and sanitary purposes. (Wat. Code, § 106.3, subd. (a).) The Legislature prioritizes this right by designating domestic uses as the highest and best use of water. (Wat. Code, § 106 ["It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water…"]; accord *Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1185.)

All relevant State agencies must consider this policy when revising, adopting, or establishing policies and regulations governing the use of domestic water. (Wat. Code, § 106.3, subd. (b).) The Urban Water Management Planning Act ("UWMPA"), for example, directs member water agencies to prepare an urban water management plan every five years. (Wat. Code, § 10610 et seq.). These plans serve as a long-range forecasting tool for local water agencies to ensure they have sufficient water supplies to meet existing and future needs while also meeting conservation and efficient-use standards. (Wat. Code, §§ 10610.2, 10610.4.) Within the Bay Area, the San Francisco Public Utilities Commission ("SFPUC") is the water agency responsible for preparing and updating its Urban Water Management Plan ("UWMP") for the San Francisco Regional Water System ("Regional System").[3] The Regional System also serves 26

[3] See San Francisco Pub. Util. Comm., *2020 Urban Water Management Plan* (Apr. 2021), p. 1-1 (available online at: https://www.sfpuc.gov/sites/default/files/documents/UWMP%20Public%20Review%20Draft%2004012021%20FINAL.pdf) (hereinafter, "SFPUC 2020 UWMP"); San Francisco Pub. Util.

wholesale agency customers who are members of, and collectively comprise, the Bay Area Water Supply and Conservation Agency ("BAWSCA").[4] Those member agencies also must prepare respective UWMPs based on anticipated water supply demands within their jurisdictions.

The State's Porter-Cologne Act, which dictates how the Water Board sets and imposes water quality standards, also considers the human right to water and corresponding beneficial uses. Water Code, section 13241, for example, directs regional water boards to establish water quality objectives that consider "[e]conomic considerations" and "[t]he need for developing housing within the region." (Wat. Code, § 13241, subds. (d)–(e).) Considering these factors to formulate local water quality objectives "will ensure the reasonable protection of beneficial uses…" (*Ibid.*)

These statutes are two of many that help facilitate the Legislature's goal of prioritizing domestic water uses in furtherance of California's human right to water.

2. The State of California—and the Bay Area in particular—remains in a dire housing crisis.

California is in a housing accessibility and affordability crisis of "historic proportions." (Gov. Code, §§ 65589.5, subd.

Comm., *Draft 2025 Urban Water Management Plan* (Mar. 2026), p. 1-1 (available online at: https://www.sfpuc.gov/sites/default/files/documents/2025-UWMP-Public-Draft.pdf) (hereinafter, "SFPUC Draft 2025 UWMP").

[4] *Ibid.*

(a)(2)(A), 65580, subd. (a).) According to the U.S. Department of Housing and Urban Development ("HUD"), in 2024, 187,084 residents—or, 48 out of every 10,000 residents—in California experienced homelessness, making California one of two states with the highest number of people experiencing homelessness in the country.[5] Of those residents experiencing homelessness, 66% are unsheltered.[6] The non-partisan California Legislative Analyst's Office has found that "building less housing than people demand drives high housing costs" and "the high costs of housing is a significant factor in the state's homelessness crisis."[7]

Nowhere is this crisis more apparent than in the Bay Area, which currently "fac[es] the most significant crisis in the region's history, as countless residents are facing insurmountable housing costs, spend hours driving every day, are one paycheck away from an eviction, or experience homelessness." (Gov. Code, § 64501,

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[5] See U.S. Dept. of Housing and Urban Dev., *The 2024 Annual Homelessness Assessment Report (AHAR) to Congress – Part 1: Point-in-Time Estimates of Homelessness* (Dec. 2024), p. 8 (available online at: https://www.huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part-1.pdf).

[6] *Ibid.*

[7] See Taylor, M., *California's High Housing Costs: Causes and Consequences*, Cal. Legislative Analyst Office (Mar. 17, 2015), p. 3 (available online at: https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf); see also Cal. Legislative Analyst's Office, *California's Housing and Homelessness Challenges in Context*, Presented to: Senate Committee on Budget and Fiscal Review (Feb. 27, 2023), p. 3 (available online at: https://lao.ca.gov/handouts/socservices/2023/Housing-and-Homelessness-Challenges-020623.pdf).

subd. (a).) In 2024, jurisdictions within the Bay Area accounted for 33,140 of California's homeless residents—one of the largest concentrations in the country.[8] The cities and counties of San Francisco, San Jose, and Santa Clara have consistently ranked in the top five major metro areas with the largest concentrations of chronically homeless individuals.[9]

Considering this crisis, the Legislature has declared the "availability of housing … of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every Californian…a priority of the highest order." (Gov. Code, § 65580, subd. (a).) Achieving this goal "requires the cooperative participation of government and the private sector in an effort to expand housing opportunities and

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[8] See U.S. Dept. of Housing and Urban Dev., 2007–2024 Point-in Time Estimates by CoC (Dec. 2024) (available online at: https://www.huduser.gov/portal/datasets/ahar/2024-ahar-part-1-pit-estimates-of-homelessness-in-the-us.html).

[9] See U.S. Dept. of Housing and Urban Dev., *The 2020 Annual Homelessness Assessment Report (AHAR) to Congress – Part 1: Point-in-Time Estimates of Homelessness* (Jan. 2021), p. 71 (available online at: https://www.huduser.gov/portal/sites/default/files/pdf/2020-ahar-part-1.pdf); see also U.S. Dept. of Housing and Urban Dev., *The 2021 Annual Homelessness Assessment Report (AHAR) to Congress – Part 1: Point-in-Time Estimates of Homelessness* (Feb. 2022), pp. 21, 53 (available online at: https://www.huduser.gov/portal/sites/default/files/pdf/2021-ahar-part-1.pdf); see also U.S. Dept. of Housing and Urban Dev., *The 2022 Annual Homelessness Assessment Report (AHAR) to Congress – Part 1: Point-in-Time Estimates of Homelessness* (Dec. 2022), pp. 55–56 (available online at: https://www.huduser.gov/portal/sites/default/files/pdf/2022-ahar-part-1.pdf).

accommodate the housing needs of Californians of all economic levels." (*Id.*, subd. (b).) As such, "[l]ocal and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community." (*Id.*, subd. (d).)

In furtherance of these goals, over the last decade, the Legislature has enacted several statutory schemes to facilitate more housing development. For example, the Housing Crisis Act of 2019 ("HCA") aims to increase housing supply and speed up construction by streamlining permit review and limiting local discretion to deny qualifying housing projects. (Gov. Code, §§ 65589.5, 65950, 65905.5, 65941.1; Sen. Bill No. 330 (2019–2020 Reg. Sess.).) A companion statute, the Housing Accountability Act ("HAA"), prevents statutory whiplash by allowing housing developers to freeze in place the objective standards in effect when they submit a project application. (Gov. Code, § 65589.5.)

To address the housing-unit deficit needed to meet demand, the Legislature also assigns a certain number of units (with varying degrees of affordability) to each locality—i.e., the Regional Housing Needs Allocation ("RHNA"). (Gov. Code, § 65588.) These localities must update their respective land use planning documents and zoning codes to ensure that sufficient sites are available to accommodate their share of allocated units. (Gov. Code, §§ 65583, 65583.2, 65585.) Compliance is mandatory—failure to do so will result in fines or accelerated rezoning. (*Ibid.*; see Gov. Code, § 65580, subd. (f) ["Designating

and maintaining a supply of land and adequate sites suitable, feasible, and available for the development of housing sufficient to meet the locality's housing need for all income levels is essential to achieving the state's housing goals"].)

In the Bay Area, for example, the Association of Bay Area Governments ("ABAG") is responsible for allocating shares of the State's Regional Housing Needs Determination ("RHND") to each local government within the nine-county area.[10] The Legislature furthered these efforts by tasking ABAG (in tandem with the Metropolitan Transportation Commission) with developing and updating "Plan Bay Area"—a long-range planning document that synchronizes the RHNA process and imposes State-mandated performance targets. (See Gov. Code, § 65080, subd. (b)(2)(C)(i); Sen. Bill No. 375, stats. 2008, ch. 728.)[11] For housing targets, ABAG must "[a]ccommodate future growth at all income levels."[12] ABAG anticipates that this future growth will yield nearly 1 million new households and 1.3 million new jobs—bringing the region's total to 9.6 million people, 3.8 million households, and

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[10] See Assoc. of Bay Area Govts., *Final Regional Housing Needs Allocation (RHNA) Plan: San Francisco Bay Area, 2023–2031* (Dec. 2021), p. 6 (available online at: https://abag.ca.gov/sites/default/files/documents/2021-12/Final_RHNA_Allocation_Report_2023-2031-approved_0.pdf) (hereinafter, "2023–2031 Bay Area RHNA Plan").

[11] See Assoc. of Bay Area Govts., *Plan Bay Area 2050+* (Mar. 2026), p. 23 (available online at: https://planbayarea.org/sites/default/files/documents/Final_Plan_Bay_Area_2050_Plus_0.pdf?cb=c85e41cb) (hereinafter, "Plan Bay Area 2050+").

[12] *Id.*, p. 6.

5.4 million jobs—by the year 2050.[13] Given this, the State, through the Department of Housing and Community Development ("HCD"), has determined that ABAG must plan for 441,176 new housing units between 2023 and 2031.[14] To achieve these targets, Plan Bay Area prioritizes developing and streamlining a wider range of housing types in existing areas of growth, such as those high in resources and rich in transit.[15]

Various agencies and jurisdictions rely on ABAG's and Plan Bay Area's projections when anticipating future demands. For example, as part of their obligations under the UWMPA, SFPUC and BAWSCA's member agencies rely on RHNA housing targets and Plan Bay Area population projections to determine anticipated future water demands in their respective UWMPs. (See Wat. Code, §§ 10631, subd. (a), 10631.1, subd. (a), 10635, subd. (a) [urban water suppliers must assess the reliability of water service and include population projections "based upon data from state, regional, or local service agency population projections," including "use for single-family and multifamily residential housing needed for lower income households"].) Thus, the reliability of the Bay Area's water supply—as contemplated by these UWMPs—is vital to meeting the region's RHNA targets and Plan Bay Area's housing goals.[16]

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[13] *Id.*, pp. 11, 58–59.
[14] 2023–2031 Bay Area RHNA Plan, *supra*, p. 11.
[15] Plan Bay Area 2050+, *supra*, p. 83.
[16] ABAG explains that "[l]ack of capacity for…water service" due to statutory or regulatory restrictions is one of the chief constraints to developing additional housing in the region. (See 2023–2031 Bay Area RHNA Plan, *supra*, p. 37.)

3. Adopting Plaintiffs' interpretation of Section 5937 would exacerbate the State's housing crisis by preventing agencies and courts from considering housing development and other domestic uses when determining how much water should be left instream.

The legislative goals outlined above are clear: Californians have the right to attain safe, decent housing and drinking water. Providing housing, however, rests upon water availability. As municipalities continue to tackle the State's ongoing housing crisis, their need to ensure that new units have adequate access to clean drinking water becomes vitally important, particularly since many water suppliers, including those in the Bay Area, rely on surface water. In other words, access to safe, affordable water and the State's need to provide ample, accessible, and affordable housing are entwined. Communities cannot expand their housing stock to accommodate new and growing populations without ensuring that new housing has access to safe, affordable water.

Plaintiffs' interpretation of Section 5937, however, would disrupt California's management of its surface water resources, thereby preventing the State from achieving its concurrent goal of redressing its longstanding housing crisis. A decision in favor of Plaintiffs' reading of Section 5937 may require water rights holders and appropriators who normally divert surface water from dammed sources to keep more water instream that would otherwise be diverted to support beneficial off-stream uses, e.g., domestic urban uses.

This problem is particularly prescient in the Bay Area. As explained previously, SFPUC operates the Regional System, which supplies water to 2.7 million people across the San Francisco, Silicon Valley, and East Bay areas.[17] As part of this network, the Regional System provides water to 26 wholesale agency customers in Alameda, Santa Clara, and San Mateo Counties, who are members of BAWSCA.[18] These agencies collectively use about two-thirds of the Regional System's water supplies.[19] Eighty-five percent of the Regional System's water supplies comes from the Hetch Hetchy Reservoir on the Tuolumne River, which is located downstream from two dams: the Hetch Hetchy and Don Pedro dams.[20] The Regional System feeds water from the Reservoir into aqueducts that transport the water to Bay Area reservoirs and eventually to local customers.[21] (See generally *City of Palo Alto v. City and County of San Francisco* (1977) 548 F.2d 1374, 1376–1378 [describing the formation and history of the Regional Water System under the federal Raker Act].)

Within the next 25 years, SFPUC anticipates that population growth will yield more demand for its water

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[17] SFPUC 2020 UWMP, *supra*, p. 1-1; SFPUC Draft 2025 UWMP, *supra*, p. 1-1.
[18] *Ibid.*
[19] *Ibid.*
[20] SFPUC 2020 UWMP, *supra*, pp. 1-1, 3-6; SFPUC Draft 2025 UWMP, *supra*, pp. 1-1, 3-4–3-5, 3-8, 3-16.
[21] SFPUC Draft 2025 UWMP, *supra*, pp. 3-2–3-9.

supplies.[22] Housing units constructed, for example, are expected to grow from nearly 418,000 units to 559,000 units—a 33.8% increase.[23] This growth, however, will occur alongside anticipated reductions in the Regional System's available water supply.[24] Specifically, the Water Board's 2018 Bay-Delta Plan Amendment established new flow objectives for three Lower San Joaquin River tributaries, including the Tuolumne River, with the goal of increasing salmonid populations.[25] If fully implemented, that amendment could reduce the Regional System's water supplies by up to 43% during prolonged droughts.[26] Under this scenario, once SFPUC allocates its available water supplies to the anticipated demands of its wholesale and retail customers, the retail portion of its water supplies will experience a shortage of up to 29%, while its wholesale customers will experience a shortage of up to 49%.[27]

The Bay-Delta Plan Amendment has also spurred other recent water-related restrictions on housing development in the Bay Area. For example, on May 1, 2023, the City of Foster City and the Estero Municipal Improvement District Board of Directors adopted a Water Neutrality Ordinance in response to

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[22] See, e.g., *id.*, p. 3-17 (population in the Regional System's wholesale service area is projected to increase from about 1.9 million residents to over 2.6 million by the year 2050); see also *id.*, p. 4-8 (Figure 4-3. Projected Retail Demands, Population, and Per Capita Water Use).
[23] *Id.*, pp. 1-1, 4-5–4-9.
[24] *Id.*, pp. 1-1–1-2.
[25] *Id.*, p. 1-2.
[26] *Ibid.*
[27] *Ibid.*

the "[s]ignificant water supply shortfalls … currently projected in future single and multiple dry years [that will occur] directly because of the Bay-Delta Plan Amendment implementation."[28] This ordinance further restricts new housing development by requiring developers to offset new water demand created by a proposed development with reductions in demand elsewhere in the service territory on a 1:1 basis, thereby burdening residents of these new developments with funding water infrastructure costs.

Because SFPUC and its wholesale customers rely on dammed water from the Tuolumne River, adopting Plaintiffs' position would, in practice, mean Section 5397 applies to that water supply. If these suppliers cannot balance the reasonableness of their competing demands—as the Constitution requires—surface water supplies for domestic urban uses, including housing, could be effectively cut off. For SFPUC and its wholesale customers, this would significantly compound anticipated water shortages and have Bay Area-wide impacts on an unprecedented scale, leaving many communities to struggle with water available for consumption and critically needed housing development.

Plus, in the absence of Article X, Section 2's balancing test, the Legislature's housing goals will be relegated to mere

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[28] Estero Mun. Improvement Dist., Ordinance No. 138, May 1, 2023 (available online at: https://portal.laserfiche.com/Portal/DocView.aspx?id=170873&repo=r-0ff32e1a&searchid=a10d3fdb-c164-45ff-83d1-7d60871518ca).

aspirations that are perpetually vulnerable to indirect environmental mandates that fail to account for the human cost of the State's housing shortage. This, in turn, could inadvertently force many municipalities to violate key housing statutes, including the HCA and HAA, which require State approval for any action that would inherently limit or impose a moratorium on housing development.[29]

Thankfully, upholding the Court of Appeal's decision would prevent this unthinkable reality from ensuing. By maintaining the Constitution's reasonableness standard, municipalities—especially those in the Bay Area—can ensure their urban water management plans account for reliable water flows to meet existing and future domestic uses. This reliability is crucial, as it ultimately determines whether localities can provide sufficient, safe water supplies for their mandated housing allocations. And because expanding the State's housing opportunities "requires the cooperative participation of government and the private sector," reliable water supplies are even more crucial for developers who need the assurance to secure funding and other requisite capital. (Gov. Code, § 65580, subd. (b).)[30]

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[29] See, e.g., Dept. of Housing and Comm. Dev., *Letter of Inquiry to City of Seaside re: Water Meter Moratorium* (June 30, 2022) (available online at: https://www.hcd.ca.gov/community-development/housing-element/docs/monseaside-noi-063022.pdf).

[30] See Wunderman, J., *Housing abundance in California first requires water abundance*, The Sacramento Bee (Aug. 28, 2025) (available online at: https://www.sacbee.com/opinion/op-ed/article311858542.html).

For these reasons, Plaintiffs' interpretation of Section 5937 would improperly elevate one beneficial use (water for fish) over another (water and housing for Californians), in turn thwarting the Constitution, along with the Legislature's explicit directive to develop more housing. Obstructing surface water supplies from being diverted for their intended purpose will unnecessarily exacerbate the State's housing shortage and prevent local jurisdictions from meeting their allocated regional housing needs.

III. CONCLUSION

For the foregoing reasons, the Bay Area Council and SAMCEDA respectfully urge this Court to reaffirm that Article X, Section 2 of the California Constitution governs all water use in the State and that Fish and Game Code, section 5937, must be interpreted as subordinate to, and consistent with, that constitutional command.

To hold otherwise would upend California's carefully balanced water system, invite widespread litigation, and threaten the State's capacity to meet critical housing and economic development goals.

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Respectfully submitted,

Dated: May 4, 2026

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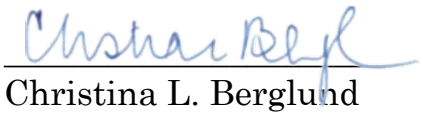
CERTIFICATE OF COMPLIANCE

[Cal. Rules of Court, rule 8.204(c)]

Pursuant to California Rules of Court, rule 8.204(c), I hereby certify that this AMICI CURIAE BRIEF contains 5,695 words, according to the word counting function of the word processing software used to prepare this brief, excluding covers, table of contents, table of authorities, signature blocks, and the certificate of compliance.

Executed on May 4, 2026, in Sacramento, California.



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On May 4, 2026, I served the following:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of May 2026, at Carmichael, California.

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Supreme Court of California

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APPLICATION	Application for Leave to File Amici Curiae Brief for the Bay Area Council and San Mateo Economic Development Association in Support of Real Parties in Interest North Kern Water Storage District, et al

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/4/2026

Date

/s/Kathryn Ramirez

Signature

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