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Supreme Court of California
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IN THE SUPREME COURT OF CALIFORNIA

CASE NO. S290840

BRING BACK THE KERN et al.,
Plaintiffs and Respondents,

vs.

CITY OF BAKERSFIELD,
Defendant and Respondent.

NORTH KERN WATER STORAGE DISTRICT et al.,
Real Parties in Interest and Appellants.

On Review of a Decision by the Court Of Appeal,
Fifth Appellate District, Case No. F087487 (Lead)

APPLICATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF BY CALIFORNIA WATER ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST; [PROPOSED] AMICUS CURIAE BRIEF

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APPLICATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND STATEMENT OF INTEREST OF AMICUS CURIAE

Pursuant to Rule 8.520 of the California Rules of Court, the California Water Association applies for permission to file the attached proposed Amicus Curiae Brief.

Description of Amicus Curiae. California Water Association ("CWA") is a non-profit organization that represents water utilities across California that are regulated by the California Public Utilities Commission. CWA member companies serve drinking water to more than 6 million Californians, and CWA is dedicated to ensuring that its members can continue to serve clean and reliable drinking water in California for years to come.

California Water Association's Interest. Because of CWA's dedication to ensuring that its members can continue to serve clean and reliable drinking water in California, CWA has an interest in the outcome of this case. CWA members are only able to serve drinking water if they have a source of water supply, which depends in part on CWA members' right to use water for the beneficial purpose of domestic use. As a result, CWA members have an interest in any pronouncement regarding the standard for reasonableness under article X, section 2.

California Water Association has carefully reviewed the petitions for review and briefs on the merits filed in this Court, and thus is familiar with the arguments made by the parties.

California Water Association does not repeat arguments made by the parties, but instead presents its own views on the issues under review.

The proposed Amicus Curiae Brief will assist the Court in deciding the matter by presenting the views of CWA members, who serve drinking water to millions of Californians, and explaining the manner in which this Court's decision regarding the standard for reasonableness under article X, section 2 could have unintended, far-reaching consequences.

Dated: May 4, 2026

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IN THE SUPREME COURT OF CALIFORNIA

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AMICUS CURIAE BRIEF SUBMITTED BY CALIFORNIA WATER ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST

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I. INTRODUCTION

Nearly one hundred years of established precedent from this Court requires that the trial court here should have conducted fact specific reasonableness analysis pursuant to article X, section 2 of the California Constitution.[1]

After convincing the trial court that it did not have jurisdiction to engage in the reasonableness analysis required by article X, section 2, plaintiffs now concede that the trial court should have engaged in an "as applied" reasonableness analysis of Fish and Game Code section 5937 as to the stream system at issue herein. Due to this complete change in position, this Court need not review the Opinion of the Court of Appeal, as there is no longer any legal issue for this Court to resolve.

However, should this Court decide to engage in review, this Court should adopt the two limited holdings of the Court of Appeal: (1) that the trial court did have jurisdiction to conduct the reasonableness analysis required by article X, section 2, and (2) that the injunction issued by the trial court was impermissibly vague.

This Court should avoid issuing pronouncements regarding the relationship between article X, section 2 and Fish and Game Code section 5937, and the respective roles of the Court and Legislature in complying with the constitutionally required reasonableness analysis, without the necessary trial court factual

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[1] Hereinafter, references to article X, section 2 refer to article X, section of the California Constitution.

record. Without such a factual record, there is risk of the Court issuing an opinion that unintentionally impacts the relationship between the reasonableness requirement and other statutory declarations regarding the beneficial and reasonable use of water. Such an opinion could also severely impact the role of agencies, delegated authority by the Legislature pursuant to article X, section 2, to make determinations regarding the reasonable use of water. Finally, without a record as to the circumstances of the stream system at issue here, the role of the public trust doctrine and associated case law is unclear.

One cannot overstate the importance of this Court's action in this case, and thus, the importance of proceeding with caution, on a full record. As this Court observed almost a century ago, "[t]he economic use of waters of this state is of the utmost importance to its development and well being… not only under present conditions, but for all time to come. It requires no extraordinary foresight to envision the great and increasing population of the state and its further agricultural and industrial enterprises dependent upon stored water." (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 701 (*Gin S. Chow*).)

II. ARGUMENT

A. This Court should dismiss review, as plaintiffs' concede now that some level of reasonableness review is required.

Despite the decades of precedent from this Court holding the opposite, plaintiffs successfully convinced the trial court that

it did not have "jurisdiction" to conduct the required analysis. After repeatedly assuring both the trial court and the Court of Appeal that Fish and Game Code section 5937 is a strict liability statute unmoored by the reasonableness requirement in article X, section 2, plaintiffs now admit that the trial court does have jurisdiction to engage in an "as applied" reasonableness analysis. (See OBOM 63–64, 68–72.)

Given that plaintiffs now concede that the trial court should have conducted some level of reasonableness review when evaluating whether to issue an injunction pursuant to Fish and Game Code section 5937, this Court need not review the Court of Appeal's opinion. "The Supreme Court may…dismiss review when a supervening event renders the case moot for any reason, e.g., when the parties reach a settlement, when a party seeking personal relief dies, or when the court orders review to construe a statute that is then repealed before the court can act." (Advisory Com. com., 23 pt. 4 West's Ann. Codes, Rules (2017 ed.) foll. rule 8.528(b), p. 304.) By admitting that some level of reasonableness analysis was required, plaintiffs essentially "settled" the issue of whether the trial court had jurisdiction to engage in such analysis.

Therefore, the most efficient resolution is simply to dismiss review and allow the trial court to conduct the reasonableness analysis that plaintiffs successfully managed to avoid at the trial court level but are now acknowledging should have been conducted.

Plaintiffs quibble about what reasonableness standard should apply and whether the circumstances of the Kern River system at the time of the issuance of the injunction met their desired reasonableness standard. But without a trial court record establishing facts necessary to evaluate reasonableness, this Court has no facts to review, and such a review would be improvident.

B. If this Court does engage in review, this Court should adopt the narrow holdings of the Court of Appeal.

Should this Court choose to engage in review, it should adopt the two narrow holdings of the Court of Appeal.

First, this Court should remand for the trial court to "determine whether and to what extent using the waters of the Kern River to keep fish in good condition is a reasonable and beneficial use of water under section 2" under "the totality of the circumstances." (*Bring Back the Kern v. City of Bakersfield* (2025) 110 Cal.App.5th 322, 350–357 (*BBTK*).)

Second, the Court of Appeal determined that if the trial court issues an injunction on remand, the trial court should "immediately set an objective standard for compliance upon a proper showing by the moving parties." (*BBTK*, *supra*, 110 Cal.App.5th at pp. 357-359.)

This Court should adopt these two narrow holdings for the reasons explained below.

a) The trial court does have "jurisdiction" to consider whether a proposed injunction under Fish and Game Code section 5937 violates article X, section 2's reasonableness requirement.

This Court's precedent and the Court of Appeal agree that a record of fact-specific reasonableness analysis should have been developed at the trial court level. This Court should affirm the Court of Appeal's narrow holding that the trial court "must determine whether and to what extent using the waters of the Kern River to keep fish in good condition is a reasonable and beneficial use of water under section 2…look[ing] to the totality of the circumstances, which include effects on fish and other wildlife, recreation, water quality, the transportation of adequate water supplied where needed, water supplies for the domestic needs of people such as the residents served by the City of Bakersfield, irrigation, effects on other users of the watercourse, and any effects on "appropriations essential to the economic development of this state." (*BBTK*, *supra*, 110 Cal.App.5th at pp. 356-357, internal citations omitted.)

Not only did the Trial Court have "jurisdiction" to engage in some sort of fact-specific reasonableness analysis, its failure to do so was unconstitutional. For nearly a century, this Court has steadfastly held that the reasonableness requirement in article X, section 2 necessitates a fact-specific inquiry.

Only a few years after article X, section 2 was amended to include the reasonableness requirement at issue in this case, this Court addressed the role of the reasonableness requirement when weighed against state law inconsistent with it.

In *Gin S. Chow*, this Court evaluated whether article X, section 2 superseded the legal doctrine of riparian rights, which contradicts article X, section 2 as it does not require that riparian rightsholders' use of water be reasonable. This Court held that article X, section 2 preempted the doctrine of riparian rights, as "courts are bound to enforce" article X, section 2's reasonableness requirement to all use of water. (*Id*. at pp. 703-705.)

A few years later, this Court addressed the interaction between article X, section 2 and statutes that implicate the use of water, like Fish and Game Code section 5937.

In *Tulare Irr. Dist. V. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489 (*Tulare*), this Court analyzed whether section 11 of the original Water Commission Act, which declared that 10 years of nonuse of a riparian right created a conclusive presumption of abandonment, ran afoul of article X, section 2. (*Tulare*, *supra*, 3 Cal.2d at pp. 530-531.) This Court determined that "[i]n so far as the section attempts to declare that ten years' nonuse, without an intervening use, shall constitute an abandonment of the riparian right, we think the section is unconstitutional." (*Id*. at p. 530.)

> This Court explained that:
> What is a beneficial use, of course, depends upon the facts and circumstances of each case. ***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 great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.***

(*Tulare*, *supra*, 3 Cal.2d at p. 567.)

And this Court has consistently applied this same rule of requiring a fact-specific analysis of a stream system in the decades since *Gin S. Chow* and *Tulare*.

In *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339 (*Long Valley*), this Court reviewed a Water Board order in an adjudication of water rights in a stream system. (*Long Valley*, *supra*, 25 Cal.3d at p. 339.)

Like the statutory provision declared unconstitutional in *Tulare*, the Water Board's order extinguished riparian rights due to nonuse. (*Long Valley*, *supra*, 25 Cal.3d at p. 357.) Unlike the statutory provision declared unconstitutional in *Tulare* though, the Water Board's order resulted after "a complex balancing of both public and private interests." (*Id*. at p. 354.)

This Court ultimately distinguished *Tulare*, reasoning that "*Tulare* is distinguishable from the issue before us in that the statute therein treated the right as automatically abandoned as a result of 10 years' nonuse, ***without consideration of other needs and uses of the water in the stream system***. The statute therefore was ***inconsistent with the mandate of the amendment to promote the reasonable beneficial use of state waters***." (*Long Valley*, *supra*, 25 Cal.3d at p. 354, emphasis added.)

This Court elaborated:

> It is well established that what is a reasonable use of water varies with the facts and circumstances of the particular case. (*Tulare*, at p. 567 of 3 Cal.2d; *Gin S. Chow v. City of Santa Barbara, supra*, 217 Cal. 673, 706.) And it appears self-evident that the reasonableness of a riparian use cannot be determined without considering the effect of such use on all the needs of those in the stream system (*Tulare*, at p. 524 of 3 Cal.2d), nor can it be made "*in vacuo* isolated from statewide considerations of transcendent importance." (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 140 [60 Cal.Rptr. 377, 429 P.2d 889].) These statewide considerations are that "limited water resources be put only to those beneficial uses 'to the fullest extent of which they are capable,' that 'waste or unreasonable use' be prevented, and that conservation be exercised 'in the interest of the people and for the public welfare.' (Cal. Const., art. XIV, § 3 [now art. X, § 2].)" (*Id.*, at p. 141.)
> (*Long Valley*, *supra*, 25 Cal.3d at p. 354.)

Thus, a fact-specific, reasonableness analysis is required pursuant to article X, section 2 to determine the deference, if any, that should be accorded to Fish and Game Code section 5937 under existing case law. What is reasonable in terms of water use depends heavily upon myriad factors, many of which are constantly in flux. Indeed, deference by the trial court to Fish and Game Code section 5937 as applied to the segments of the Kern River at issue might be wildly inappropriate for other stream/dam systems or even the same segments of the Kern River at a different point in time. Thus, it is imperative to have a trial court record with a specifically applicable reasonableness analysis.

Almost one hundred years of established precedent from

this Court dictates that the trial court here not only had the authority to engage in reasonableness analysis when determining what level of deference to give to Fish and Game Code section 5937, but was constitutionally required to do so.

b) The injunction issued by the trial court was improperly vague.

Without setting a minimum flow rate necessary to keep fish in good condition, an injunction pursuant to Section 5937 is an impermissible "obey the law" injunction. (*BBTK*, *supra*, 110 Cal.App.5th at pp. 357–358.)

If other water users in a stream system do not have sufficient notice of the amount of water they need to stop using to allow sufficient fish flow, they cannot possibly avoid contempt of the injunction.

The Court of Appeal also noted that the reasonableness requirement would also be relevant in determining a flow rate for injunctive purposes. *(BBTK, supra,* 110 Cal.App.5th at pp. 357–358.) The Court of Appeal explained that determining a flow rate will be necessary for the trial court because "the reasonableness analysis required by section 2 requires at least an estimate of how much water previously used for domestic consumption, irrigation, etc., will now be dedicated to the in-stream public trust use embodied in [Fish and Game Code] section 5937." (*Id.* at p. 358)

C. Without a record of reasonableness analysis, this Court should refrain from engaging in the

policymaking exercise encouraged by Plaintiffs due to the potential for unintended, far-reaching impacts.

There is no record of reasonableness analysis at the trial court level. Nonetheless, the Plaintiffs ask the Court for a decision as to the respective roles of the Courts and the Legislature under article X, section 2, untethered from any factual analysis of reasonableness at the trial level. Specifically, they ask the Court to determine what deference should be accorded the legislative enactment and how the burden of proof should be allocated. In doing so, plaintiffs essentially ask the Court to make an improper policy pronouncement in a complex and sensitive area of water law without a grounding in the specific factual circumstances of this case.

Indeed, this Court cautioned against such action in *Long Valley*, noting that the reasonableness requirement is "supported by compelling policy considerations…[such as] assuring certainty to the existing economy and reasonable predictability to the uses of water in a stream system." (*Long Valley*, *supra*, 25 Cal.3d at p. 354.) This Court explained that "[u]ncertainty concerning the rights of water users has pernicious effects. Initially, it inhibits long range planning and investment for the development and use of waters in a stream system." (*Id*. at p. 355.) "Uncertainty also fosters recurrent, costly and piecemeal litigation" and "impairs the state's administration of water rights." (*Id*. at p. 356.)

While there are likely many additional areas of law that

could be indirectly affected by this Court wading into the questions about deference on which plaintiffs seek a determination, California Water Association focuses on unanswered questions and potential for unintended consequences in three major areas: (1) the interaction between the constitutional reasonableness requirement and statutes other than Fish and Game Code section 5937, (2) areas where legislative authority has been delegated, and (3) the role of the public trust doctrine.

a) How does the constitutional reasonableness requirement interact with statutes other than 5937 that also contain Legislative pronouncements regarding the reasonable or beneficial use of water?

Like Fish and Game Code section 5937, many sections of the Water Code implicate use of water and contain Legislative pronouncements regarding the reasonable or beneficial use of water. Without a record of reasonableness at the trial court level specific to facts required for analysis of compliance with Fish and Game Code section 5937, this Court could potentially issue an opinion that, at best, increases uncertainty with regard to water rights and, at worst, unintentionally upends existing precedent.

For example, Water Code section 106 declares that it is

"the established policy of this State that ***the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation***." (Water Code § 106, emphasis added.) Similarly, Water Code section 10801 goes so far as to state that "[s]ignificant noncrop beneficial uses are associated with agricultural water use, including the preservation and enhancement of fish and wildlife resources."

As another example, Water Code section 1005.1 contains the pronouncement that nonuse of groundwater extraction rights is reasonable and beneficial use of water as long as the alternate supply of water the rightsholder uses is put to beneficial use.

If this Court issues an opinion regarding the level of deference to Fish and Game Code section 5937 without fact-specific record as to reasonableness, it is unclear whether that level of deference would also apply to the statutes discussed above, which are examples only.

b) What happens when the Legislature delegates its authority under article X, section 2?

The posture of this case involves the interaction between article X, section 2 and a statutory provision promulgated by the Legislature. Nevertheless, plaintiffs encourage this Court to decide the level of deference due by a court when evaluating the reasonableness of a use of water directed by an agency that has been delegated the power to make a reasonableness determination pursuant to article X, section 2. (OBOM 60-63.)

As the plaintiffs note, the First District held in *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463 that the Legislature may delegate authority to the Water Board pursuant to article X, section 2 to develop rules of reasonable use. (OBOM 57.) However, the Second District subsequently clarified in *Los Angeles Waterkeeper v. State Water Resources Control Bd.* (2023) 92 Cal.App.5th 230 that article X, section 2 grants the Legislature the "discretion as to how to carry out the principles of article X, section 2, including designating the officials or agencies responsible for doing so," but it also "empowers the courts to enforce the proscription on unreasonable use…" (*Id.* at p. 272.)

Yet plaintiffs ask this Court to determine that any conflict between the Legislature (including agencies delegated legislative power) and the Judiciary as to whether a use of water is reasonable pursuant to article X, section 2 "must be" resolved in favor of the Legislature or administrative agency, rather than the Judiciary. (OBOM 62-63.)

Contrary to plaintiffs' assertions, there is no case law establishing a universal doctrine balancing the authority between an agency empowered by the Legislature pursuant to article X, section 2 and the judges tasked with enforcing the constitutional reasonableness requirement. While the Court in *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585 (*Cal Trout I*) noted that "[w]here various alternative policy views reasonably might be held whether the

use of water is reasonable within the meaning of article X, section 2, the view enacted by the Legislature is entitled to deference by the judiciary," it also held that the Legislature's authority "is not unlimited." (*Cal Trout I*, *supra*, 207 Cal.App.3d at pp. 625-626.) In addition, the Court of Appeal's holding in *Cal Trout I* regarding the level of deference accorded to the Legislature versus the Judiciary concerned the interaction between article X, section 2, and Fish and Game Code section 5946 – not section 5937.

Without a trial court record regarding the facts and circumstances of the stream system at issue, there is no record for this Court to determine the appropriate level of deference accorded to the Legislature when considering its pronouncements contained in Fish and Game Code section 5937, as applied to the Kern River, let alone in every case as plaintiffs encourage.

This Court should avoid adopting such a blanket policy, especially on the limited record here, as the potential impacts on water rights are far-reaching.

c) What is the role of the Public Trust Doctrine and *National Audubon*?

Without a factual record developed as to reasonableness as applied to the stream system at issue in this case, the Court cannot properly evaluate the role of the public trust doctrine and *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 (*National Audubon*).

As this Court explained in *National Audubon*, the public

trust doctrine developed "independently" of California water rights law. (*National Audubon*, *supra*, 33 Cal.3d at p. 445.) Nevertheless, when allocating use of water in the public trust, public trust benefits, like fishing, recreation, habitat preservation, and ecological study must be taken into account. (*Id*. at pp. 425, 434-435, 446.) However, those benefits must be weighed against other uses of water and the effects on "appropriations essential to the economic development of this state" (*Audubon*, *supra*, 33 Cal.3d at p. 445; see also *Gin S. Chow*, *supra*, 217 Cal. at pp. 701-702)."

yWithout a trial court record regarding the potential economic impacts to be balanced against public trust benefits, this Court cannot make a considered, thoughtful decision regarding the role of the public trust doctrine with regard to public trust water at issue here. Nor can it determine how that doctrine interacts with article X, section 2. The potential for unintended harmful consequences for other stream systems held in the public trust is manifest.

III. CONCLUSION

For the above reasons, this Court should either dismiss review or affirm the limited holdings of the Court of Appeal and should refrain from weighing in on issues of deference on the limited record available now.

Dated: May 4, 2026

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CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c))

The text of this brief consists of 5,327; words as counted by the program used to generate the brief.

Dated: May 4, 2026

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I, the undersigned, hereby declare: I am over 18 years of age. I am employed in the County of Los Angeles, State of California. My business address is 777 S. Figueroa Street, 34th Floor, Los Angeles, CA 90017.

On May 4, 2026, I served the foregoing **APPLICATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF BY CALIFORNIA WATER ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST; [PROPOSED] AMICUS CURIAE BRIEF** on the interested parties in this action as addressed below:

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Executed on May 4, 2026 in Los Angeles, California.

Marlene Wiman

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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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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/Marlene Wiman

Signature

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