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Supreme Court of California
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S290840

No. S290840

IN THE SUPREME COURT OF CALIFORNIA

BRING BACK THE KERN, et al.
Plaintiffs and Respondents,
v.
CITY OF BAKERSFIELD
Defendant and Respondent.

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

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

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

This Court should grant review of the Court of Appeal's opinion below ("Opinion") to resolve important questions of law and ensure uniformity of decision. As discussed in the Petition for Review ("Petition") filed by Plaintiffs and Respondents Bring Back the Kern, et al. ("Plaintiffs"), the Opinion raises serious questions regarding the constitutionality of Fish and Game Code section 5937 ("Section 5937"), the Legislature's authority to adopt statutes addressing reasonable uses of water under article X, section 2 of the California Constitution ("Section 2"), and the proper burdens on the parties in demonstrating whether and when relief may issue under Section 5937. The Opinion also squarely conflicts with settled state and federal decisional law interpreting and enforcing Section 5937.

Real Parties in Interest and Appellants' (hereafter collectively "Appellants") joint answer to the Petition ("Answer") fails to show this Court's review is unwarranted. If anything, the Answer highlights the conflicts of law and serious constitutional questions raised by the Opinion that warrant this Court's review.

ARGUMENT

I. Review is Warranted Because the Opinion's Construction of Section 2 Undermines the Legislature's Express Authority and Renders Section 5937 Presumptively Unconstitutional.

Section 2 expressly authorizes the Legislature to adopt statutes like Section 5937 that determine reasonable and beneficial uses of water in accordance with the Constitution. (See Petition at pp. 24-29.)

The Answer raises two objections to this conclusion: (1) that because a predecessor statute to Section 5937 was adopted in 1915, before Section 2 took effect, Section 5937 cannot be read as an exercise of the Legislature's authority under Section 2; and (2) that the Legislature did not engage in a fact-specific, quasi-judicial inquiry as to the reasonableness of leaving water in specific streams when it enacted Section 5937. Neither objection has merit and neither shows review is unwarranted.

A. The Legislature Exercised Its Express Authority Under Section 2 to Determine Reasonable Uses of Water by Reenacting and Substantively Amending Section 5937 Multiple Times After 1928.

Appellants contend that Section 5937 "is not an exercise of the legislature's power" to determine reasonable uses of water

because a predecessor statute to Section 5937 was enacted in 1915, prior to adoption of Section 2 in 1928. (See Answer at pp. 8, 9.) The argument is somewhat beside the point because the Opinion did not rely on Appellants' argument below that Section 5937 predated Section 2. But in any event, Appellants ignore the relevant history, including the amendment and recodification of the statute that occurred *after* the enactment of Section 2.

Much—but not all—of Section 5937's current language appeared in a former Penal Code provision adopted in 1915. (Stats. 1915, ch. 491, § 1, p. 820, former Penal Code § 637.) Among other things, that provision directed the state board of fish and game commissioners to examine dams and obstructions to ensure that dam owners both installed a "fishway" providing passage around the dam and allowed sufficient water to pass "through such fishway" to keep fish below the dam in good condition. (*Ibid.*)

However, the 1915 statute was not the Legislature's last word. Following adoption of Section 2 in 1928, the Legislature on multiple occasions amended, recodified, and reenacted the language that ultimately became Section 5937.

In 1933, the Legislature separated, reenacted, and recodified numerous provisions of former Penal Code section 637 into the Fish & Game Code. The provision requiring dam owners to allow sufficient water to pass through a "fishway" became Fish & Game Code section 525. (Stats. 1933, ch. 73, pp. 394, 443.)

In 1937, the Legislature substantively expanded this provision, adding that "in the absence of a fishway," a dam must "allow sufficient water to pass over, around or through the dam" to keep fish below the dam in in good condition. (Stats. 1937, ch. 456, pp. 1400-01, former Fish & Game Code § 525.)

Finally, in 1957, the Legislature reenacted and recodified former Fish & Game Code section 525 as Section 5937. (Stats. 1957, ch. 456, p. 1339.)

Each of these enactments occurred *after* adoption of Section 2 in 1928. This Court therefore must presume the Legislature was aware of Section 2—and acted in accordance with its express authority under Section 2—in each of these enactments. (See, e.g., *Meza v. Portfolio Recovery Associates, LLC* (2019) 6 Cal.5th 844, 862-63 [construing newly enacted statute regarding affiants' availability for service of process in limited civil cases as reflecting Legislature's awareness of existing statutes governing

service of similar types of process]; see also Amicus Brief of the California Attorney General and California Dept. of Fish & Wildlife ("AG Amicus Brief") at pp. 24-25.)

Even if the 1933 and 1957 amendments could be characterized as mere recodifications of the statute without a change in meaning, the 1937 amendment cannot. Prior to 1937, the requirement to allow sufficient water to pass a dam applied only to dams with "fishways." (Stats. 1915, ch. 491, § 1, p. 820, former Penal Code § 637; Stats. 1933, ch. 73, p. 443.) The 1937 amendments substantively modified and expanded the provision to require sufficient flows of water "over, around or through" *all* dams, including those that do not have "fishways." (Stats. 1937, ch. 456, pp. 1400-01, former Fish & Game Code § 525.)

The Kern River dams at issue in this case do not have "fishways." (AA11:2506.[1]) Accordingly, **the Kern River dams are subject to Section 5937 by virtue of the 1937 amendment, which was enacted after Section 2 took effect in 1928.** The Answer simply ignores this history.

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[1] Citations to the Appellants Appendix are denoted "AA [Volume]:[Page].

Again, the Opinion did not adopt Appellants' theory about the chronology of these two provisions. Indeed, the Opinion acknowledges that Section 5937 "reflects the Legislature's view of reasonableness" pursuant to Section 2, and it notes that Section 5937 is a "'valid' legislative enactment." (Opinion at p. 26.) Yet the Opinion nevertheless creates ambiguity as to whether courts should give effect to Section 5937's determination that leaving water in rivers for fish is reasonable. The Opinion holds that even if Section 5937 is constitutional, that conclusion "does not end the role of [Section 2] in a water use case" because a court must still determine on an ad hoc basis whether enforcement of the statute is constitutional in each specific application. (Opinion at p. 29.) The Opinion also dismisses Section 5937 as merely "one expression of the Legislature's policy preferences" rather than a binding statutory directive. (*Ibid.*) The Opinion thereby renders Section 5937 a "second-class statute," dependent for its

enforcement in every case on further ad hoc judicial fact-finding. (See Petition at pp. 27-28.)[2]

This Court should grant review to clarify that the Legislature's enactment and amendment of Section 5937—as a determination of the reasonableness of a use of water expressly authorized by the California Constitution—must be accorded the weight and deference due any other constitutionally valid legislative enactment.

B. The Legislature Was Not Required to Undertake a Fact-Specific, Stream-By-Stream Inquiry Before Determining that Leaving Water in a River to Support Fish Is Reasonable.

As discussed in the Petition, the Opinion also creates ambiguity as to whether the Legislature *itself* must conduct specific factfinding before it can enact a statute determining that a particular use of water is reasonable. (See Petition at pp. 35-38.) Picking up on this ambiguity, Appellants protest that the Petition provided "no citation demonstrating that the Legislature

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[2] The California Attorney General and Department of Fish and Wildlife also discuss the Opinion's ambiguities on these points at pages 4-7 of their May 30, 2025, Request for Depublication of the Opinion (or, in the alternative, for a grant of review).

has conducted an evaluation balancing the competing beneficial uses on any stream system when it passed section 5937." (Answer at p. 9.) Appellants apparently seek to constitutionalize a requirement that appears nowhere in Section 2 or the cases interpreting and applying it: that the Legislature must engage in stream by stream, fact-specific balancing akin to a judicial proceeding before it can exercise its constitutional authority to determine that a use of water is reasonable.

Although Appellants identify no authority for such a requirement, they apparently read the Opinion as suggesting that one exists. The Opinion attempted to distinguish Section 5937, which applies to existing dams and streams statewide, from Fish and Game Code section 5946, which requires the State Water Resources Control Board to condition new water rights permits and licenses on compliance with Section 5937 in a particular part of the state. (See Opinion at pp. 28-30.) The Court of Appeal opined that the Legislature's "consideration of the specific tradeoffs applicable to 'streams in that district'" and its "choice to prioritize fisheries in that area" under Section 5946 reflected a "balancing of the specific localized needs pertaining to the streams" of that district. (*Id.* at p. 30.) However, the Opinion

stated, this "does not mean the Legislature engaged in a similar determination as to all waterways statewide under [Section] 5937." (*Ibid.*) As discussed further in Part III, *infra*, this conclusion flowed from the Court of Appeals' misreading of the *California Trout* cases as upholding Section 5946 solely because the Legislature engaged in stream-specific "balancing."

The Opinion's ambiguities thus threaten to undercut both the Legislature's general authority to determine reasonable uses of water under Section 2 and the specific enforceability of Section 5937. Neither the Opinion nor the Answer explains why the Legislature must be required to engage in fact-specific, stream-by-stream "balancing" before its statutory requirements can be enforced. Nor does the Opinion specify exactly how detailed that fact-finding would need to be before a statute determining that a use of water is reasonable can be given the effect to which mandatory, clear statutes are usually entitled.

Appellants contend that the Opinion simply avoided an interpretation of Section 5937 that would have rendered the statute unconstitutional—which, in their view, would occur whenever Section 5937 is enforced by its terms without additional ad hoc "balancing" of other interests. (See Answer at

pp. 10-11.) But the Opinion's interpretation of Section 5937 *raises*, rather than avoids, serious constitutional questions. Statutes are presumed to be constitutional. (Petition at pp. 25-26; *Voters for Resp. Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 780.) But by insisting on further fact-finding before Section 5937 can be enforced, the Opinion effectively renders Section 5937 presumptively unconstitutional.[3] (Petition at pp. 24-29.) This Court should grant review to settle these important questions of law.

II. Review Is Warranted to Settle Important Questions of Law Regarding the Proper Burdens on the Parties in Seeking Enforcement of Section 5937.

The Answer next claims the Opinion is consistent with existing law because the Court of Appeal simply required Plaintiffs to bear the burden of demonstrating entitlement to a

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[3] As the Opinion noted, Appellants purportedly disclaim any facial challenge to Section 5937. (Opinion at pp. 24, 26, fn. 16.) They have not even attempted to demonstrate that the statute is unconstitutional in all or nearly all of its applications, as a facial challenge requires. (See, e.g., *Calif. School Boards Assn. v. State of Calif.* (2019) 8 Cal.5th 713, 723-24; AG Amicus Br. at pp. 28-29.) Yet their insistence that Section 5937 cannot be enforced without additional legislative or judicial fact-finding is effectively equivalent to a facial challenge to the statute.

preliminary injunction. The Answer and the Opinion miss the point. There is no dispute that Plaintiffs had the burden to show a likelihood of success on their claim that Bakersfield violated Section 5937. The question raised by the Opinion is whether Plaintiffs bore the *additional* burden to proactively show that Section 5937 is constitutional as applied before an injunction could issue. Such an obligation would depart from decades of established precedent.

"[I]t is garden variety constitutional law that a party challenging the constitutionality of a law as applied has the burden of 'evincing facts' showing the application is unconstitutional." (*Adoption of T.K.* (2015) 240 Cal.App.4th 1392, 1398, citing *Associated Homebuilders of Greater E. Bay, Inc. v. City of Livermore* (1961) 56 Cal.2d 847, 855.) This rule applies whether the challenger is situated as a plaintiff or as a defendant. (See, e.g., *Lent v. Cal. Coastal Com.* (2021) 62 Cal.App.5th 812, 849 [plaintiff bore burden]; *Stuard v. Stuard* (2016) 244 Cal.App.4th 768, 785 [defendant bore burden]; see also *People v. Superior Ct. (J.C. Penney Corp.)* (2019) 34 Cal.App.5th 376, 387 [real parties bore burden].)

For example, in *Stuard v. Stuard*, the Third District Court of Appeal rejected a defendant's as-applied challenge to a provision of the Family Code because the defendant failed to carry his burden of proof. (*Stuard*, *supra*, 244 Cal.App.4th at p. 785.) The trial court awarded the defendant's parents the right to visit the defendant's child. (*Id.* at p. 772.) The defendant appealed, arguing that the Family Code "as applied … violate[d] his substantive due process rights by undermining his fundamental right to parent." (*Id.* at p. 773.) The Third District emphasized that an as-applied challenge "'contemplates analysis of the facts of a particular case … to determine the circumstances in which the statute … has been applied" and to assess if "in those particular circumstances the application deprived the [defendant] of a protected right.'" (*Id.* at p. 781.) Because the defendant advanced no constitutional analysis of the facts on which he based his defense, the Court held that the defendant failed to carry his burden and affirmed the visitation order. (*Id.* at p. 785.)

In this case it is Appellants—not Plaintiffs—who challenge the trial court's application of Section 5937 as a violation of Section 2. They, like the defendant in *Stuard*, should bear the

burden to prove their defense. To the extent the Opinion implicitly shifts the burden to Plaintiffs to prophylactically demonstrate the as-applied constitutionality of Section 5937, the Opinion raises serious constitutional questions that warrant review.

Appellants' practical arguments are equally hollow. First, the Answer mischaracterizes Plaintiffs' position in this case. The Petition does not "demand … an injunction with no discernable parameters." (Answer at p. 16.) It merely argues that Section 5937 must be presumed constitutional under Section 2 unless Appellants demonstrate that the application of the statute would be "manifestly unreasonable," i.e., unconstitutional as applied. (Petition at p. 28, quoting *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 625 ("*CalTrout I*").) Appellants would have the opportunity to make that argument if and when the trial court is permitted to set a flow regime to comply with the injunction. (See AA16:3735-43 [January 9, 2024 Order on Reconsideration, indicating the court was poised to set a flow regime].) Until then, Section 5937 must be presumed to be a constitutional exercise of the Legislature's authority under Section 2.

Second, the Answer mischaracterizes the injunction. Appellants suggest that the trial court merely *presumed* that Bakersfield violated Section 5937. (Answer at p. 16.) But the trial court presumed no such thing. Rather, Plaintiffs proved—and the trial court found—each of the elements required to issue a preliminary injunction, including that Bakersfield likely violated Section 5937 and that the balance of harms favored Plaintiffs. (AA12:2781-86.)

Plaintiffs thus met their burden of proof. They should not have to bear Appellants' burden as well.

III. Review Is Warranted to Address the Opinion's Irreconcilable Conflicts with State and Federal Decisional Law.

Appellants' discussion of the *CalTrout* cases and their progeny only emphasizes why the Opinion warrants review. (Answer at pp. 11-13, discussing *CalTrout I*, *supra*, 207 Cal.App.3d at p. 626, *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187 ("*CalTrout II*"), and *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906 ("*Patterson II*").) As the Petition explains, the *CalTrout* cases firmly established the Legislature's authority to determine that maintaining in-stream flows for fish is a reasonable use of water.

(Petition at pp. 31-33.) While those cases most directly addressed Section 5946, their conclusion that the Fish & Game Code reflects the Legislature's determination of reasonable use applies equally to Section 5937. (*CalTrout I*, *supra*, 207 Cal.App.3d at p. 625 [Section 2 "authorize[s] the Legislature to enact statutes which determine the reasonable uses of water"]; see also *id.* at p. 605 & fn. 11 [directly construing Section 5937]; *CalTrout II*, *supra*, 218 Cal.App.3d at pp. 195 [same] & 202, fn. 2 ["Our plain direction [in *CalTrout I*] was to impose the statutory condition immediately in the language of section 5937."].)

The Answer attempts to dismiss the holdings of the *CalTrout* cases on the grounds that "[t]he *Cal Trout I* court specifically disclaimed any broader application of its holding to section 5937. (*Cal Trout I*, *supra*, 207 Cal.App.3d at p. 601 ['We need not reach the question of the application of section 5937 alone….']).)" (Answer at pp. 11-12.) But Appellants ignore the context of that disclaimer, which was limited to a specific argument that has no relevance here.

CalTrout I addressed Section 5937 as applied through Section 5946. (*CalTrout I*, *supra*, 207 Cal.App.3d at pp. 599-602.) Section 5937 applies directly to the owners and operators of all

dams within the state, without any mention of the rights of those owners, operators, or third parties to appropriate water. (Fish & Game Code § 5937.) Section 5946, in contrast, requires that appropriative water rights permits and licenses issued by the State Water Resources Control Board in a particular part of the state incorporate compliance with Section 5937 as a condition of issuance, regardless of whether the holders of those rights own or operate a dam. (Fish & Game Code § 5946; *CalTrout I*, *supra*, 207 Cal.App.3d at p. 601.)

A threshold question in *CalTrout I* was whether Section 5946 applied to specific licenses held by the Los Angeles Department of Water and Power. (*CalTrout I*, *supra*, 207 Cal.App.3d at pp. 598-603.) The Department argued it could not apply because Section 5946 "only reiterates section 5937"—which, according to the Department, established a rule "only for the operation of dams" and was "not meant to operate as a rule affecting the appropriation of water." (*Id.* at pp. 599-600.)

The court found this argument irrelevant: "We need not reach the question of the application of section 5937 alone *as a rule affecting the appropriation of water*," because the plain language and legislative history of Section 5946 evince a clear

intent "to 'condition,' and therefore limit, the 'appropriat[ion]' of water" through certain permits and licenses. (*Id.* at p. 601, emphasis added.) Section 5946 thus applied to the Department's licenses whether or not Section 5937 also independently limited the Department's appropriation of water by operation of its dams. (*Id.* at p. 603.)

Critically, the court's analysis of the *constitutionality* of Section 5946 in light of Section 2 did not rely on any distinction between Sections 5946 and 5937. (See *id.* at pp. 622-25.) The court simply held that Section 2 grants the Legislature "broad flexibility in determining the appropriate means for protecting scarce water resources." (*Id.* at p. 625, quoting *In re Waters of Long Valley Creek Steam System* (1979) 25 Cal.3d 339, 351-52.) Any statute that prioritizes uses of water is a valid expression of "the Legislature's broad authority" unless it "sanction[s] a manifestly unreasonable use." (*Ibid.*) Moreover, where "various alternative policy views reasonably might be held" as to whether a use of water is reasonable, "*the view enacted by the Legislature is entitled to deference by the judiciary*." (*Id.* at pp. 624-25, emphasis added.) These conclusions apply equally to Section 5937 and Section 5946.

Appellants likewise give undue weight to the geographic specificity of Section 5946. *CalTrout I* did discuss the specific circumstances that caused the Legislature to adopt Section 5946, but it did so only to emphasize that Section 5946 affects conditions on permits and licenses for the appropriation of water. (207 Cal.App.3d at pp. 601-03.) At no point did the court hold that the Legislature must engage in fact-intensive, quasi-judicial balancing to determine that a use of water is reasonable under Section 2. (See *id.* at pp. 622-25.) To the extent the Opinion suggests otherwise, it squarely conflicts with the *CalTrout* cases.

The Answer also fails to meaningfully address the Opinion's conflicts with federal case law. Like the Opinion, the Answer omits *any* discussion of the Ninth Circuit's decision in *San Luis & Delta-Mendota Water Authority v. Haugrud* (9th Cir. 2017) 848 F.3d 1216, 1234 ("*San Luis*"). (Petition at pp. 35, 39; see also AG Amicus Br. at pp. 17-18, 29, fn. 8.) The Court in *San Luis* held that the plain language of Section 5937 "not only allows, *but requires*" compliance notwithstanding other provisions of state water law. (*San Luis*, supra, 848 F.3d at p. 1234, italics added.)

Patterson II likewise held that the Bureau of Reclamation must comply with Section 5937. (*Patterson II*, *supra*, 333 F.Supp.2d at pp. 917, 924-25.) While *Patterson II* did not directly address the constitutionality of Section 5937 under Section 2, that case relied extensively on the *CalTrout* cases and, specifically, their direct interpretation of Section 5937. (E.g., *id.* at p. 920 ["The court [in *CalTrout I*] simply interprets the statute, based on its plain meaning and context, as 'requiring the release of sufficient water to keep fish alive….'"].)

That these federal cases do not bind state courts is of little consequence; conflicts between persuasive authority—especially Ninth Circuit authority—and state law present the same risk of inconsistent decisions and lack of clear guidance that require clarification by this Court. Federal courts routinely look to California decisions—and particularly decisions of this Court—in applying substantive state law. (See, e.g., *Tabares v. City of Huntington Beach* (9th Cir. 2021) 988 F.3d 1119, 1124; see also Cal. Rules of Court, rule 8.548 [allowing Supreme Court to decide determinative question of state law at request of federal court].) Where, as here, California law is unclear due to a conflict between appellate opinions, this Court should grant review to

ensure uniformity of decision in both state courts and federal courts that must apply Section 5937.

The Petition demonstrates that the Opinion conflicts with *CalTrout I*, *CalTrout II*, and related federal case law. This Court should grant review to resolve that conflict.

CONCLUSION

As shown above and in the Petition for Review, the Legislature lawfully determined in Section 5937 that requiring sufficient flows around, over, or through dams to maintain fish in good condition is a reasonable use of water. Multiple California and federal courts have upheld and enforced this determination. The Opinion, in contrast, effectively holds Section 5937 presumptively unconstitutional, undermining the Legislature's clear authority under Section 2. The Opinion also can be read—as Appellants read it—to shift the burden of demonstrating Section 5937's as-applied constitutionality in each particular case to the party seeking enforcement. Plaintiffs therefore respectfully request that this Court GRANT the Petition to settle the important questions of law raised by the Opinion and to ensure uniformity of decision in the interpretation and enforcement of Section 5937.

DATED: June 11, 2025 SHUTE, MIHALY & WEINBERGER LLP

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CERTIFICATE OF WORD COUNT

In accordance with California Rules of Court, rule 8.504(d)(1), I certify that, exclusive of this certification and the other exclusions referenced in Rule of Court 8.204(c)(3), this REPLY TO ANSWER TO PETITION FOR REVIEW contains **3,806** words, including footnotes, as determined by the word count of the computer used to prepare this brief.

DATED: June 11, 2025 SHUTE, MIHALY & WEINBERGER LLP

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PROOF OF SERVICE

Bring Back the Kern, et al. v. City of Bakersfield, et al.
Case No. S290840
California Supreme Court

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 San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

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On June 11, 2025, I also served a true copy of the above referenced document on the parties in this action as follows:

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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.

Executed on June 11, 2025, at Union City, California.

David Weibel

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 6/11/2025 by Biying Jia, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Case Number: **S290840**
Lower Court Case Number: **F087487**

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

6/11/2025

Date

/s/David Weibel

Signature

Bundy, Kevin (231686)

Last Name, First Name (PNum)

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