

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.

[And five other cases.]*

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT • CASE No. F087487
(LEAD) CONSOLIDATED WITH F087503/F087549/F087558/F087560/F087702
KERN COUNTY SUPERIOR COURT • GREGORY PULSKAMP, JUDGE
CASE No. BCV-22-103220

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CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

INTRODUCTION

This Court granted review to address whether [Fish and Game Code section 5937](#) is subject to the constitutional requirement that all water uses be reasonable.¹ Plaintiffs’ amici agree with real parties on the points that matter. They don’t defend the trial court’s holding that courts have “no jurisdiction” to review the constitutionality of an injunction under section 5937. And there is no dispute that constitutional reasonableness is fact-specific. That consensus warrants dismissal of review or affirmance of the Court of Appeal’s narrow disposition. If the Court goes further, amici only underscore that plaintiffs have not shown a likelihood of success on their section 5937 claim.

No amicus identifies a shred of evidence that the Legislature enacted section 5937 as a statewide legislative reasonableness determination. This case does not present the Legislature-versus-judiciary clash they imagine.

No amicus rebuts real parties’ showing that section 5937 is not a freestanding command, enforceable by private litigants, that every dam owner in California release water. Section 5937 is one of three options in a framework entrusted to the discretion of the wildlife agencies. Amici ignore the statutory structure, the “in lieu of” language, and the legislative history that defeat their reading. That silence speaks volumes.

¹ Further statutory references are to the Fish and Game Code, unless otherwise noted.

Unable to ground their interpretation in text, structure, or history, the Attorney General and other amici fall back on deference. But deference is not automatic, and none is warranted here. The Attorney General identifies no instance where it or the wildlife agencies enforced the statute as plaintiffs interpret it. Much of the Attorney General's historical treatment of the statute supports real parties' reading, not plaintiffs'. Interpreting statutes and the Constitution is the judiciary's role—and plaintiffs' and their amici's effort to wrest that role from the courts raises the true constitutional concern.

Plaintiffs' amici have no answer to real parties' showing that plaintiffs' interpretation would render section 5937 facially unconstitutional—a result this Court presumes the Legislature did not intend. Plaintiffs and amici read section 5937 as a statewide reasonableness determination that applies regardless of a stream system's facts. To defend their construction, they misinterpret other statutes and Court of Appeal decisions, each of which in context supports real parties.

What remains is rhetoric—a parade of horrors unmoored from the record and the modest dispute this case presents. The Court should dismiss review, affirm the Court of Appeal's application of settled law, or affirm on the ground that plaintiffs cannot bring their section 5937 claim.

LEGAL ARGUMENT

I. This Court should dismiss review or affirm the Court of Appeal's narrow disposition.

A. No amicus defends the trial court's holding that courts have "no jurisdiction" to review whether an injunction is constitutional.

At plaintiffs' urging, the trial court held that courts have "no jurisdiction" to assess whether an injunction sought under section 5937 would be constitutional. (ABOM 28, quoting 12 AA 2815.) The Court of Appeal reversed, holding that courts *do* have jurisdiction and remanding for the trial court to decide in the first instance whether plaintiffs' requested injunction would be constitutionally reasonable. (ABOM 29, 31.) The Court need not reach the other issues plaintiffs and their amici ask this Court to decide. Instead, it should dismiss review or affirm this core proposition and allow the trial court and Court of Appeal to resolve other issues in the first instance. (ABOM 30–39.)

This holding, that constitutional limits apply to relief sought under section 5937, is conceded by both plaintiffs and their amici. (See RBOM 12 ["Of course, like any legislative act, Section 5937 is subject to constitutional limits"]; Attorney General (AG) ACB 24 ["of course" a party may "challenge application of the statute as unconstitutional"]; Cal Trout ACB 18 ["of course" there are "constitutionality challenges"]; Winnemem ACB 16 ["[o]f course" an injunction under section 5937 can be unconstitutional]; California Water Impact Network (CWIN)

ACB 9 [urging amicus’s preferred standard for reasonableness].)² No party or amicus defends the trial court’s no-jurisdiction holding or questions the Court of Appeal’s reversal of it.³ Because applying the wrong legal standard is per se an abuse of discretion (e.g., *Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420–421), that unanimity alone warrants dismissal or affirmance.

B. Amici agree that reasonableness under the 1928 amendment is fact-specific.

The Court of Appeal required plaintiffs on remand to quantify the flows sought in their request for injunctive relief so the trial court could conduct the—necessarily fact-specific—constitutional analysis. (ABOM 33–37.) That holding rests on long-settled procedural law (the ban on obey-the-law injunctions) and an oft-repeated water-law rule from this Court: it is “ ‘well established that what is a reasonable use of water varies with the facts and circumstances of the particular case.’ ” (ABOM 34,

² For amicus curiae briefs submitted on behalf of multiple entities, this brief refers to them by using a shorthand or abbreviation for the entity listed first on the brief.

³ Even the main case plaintiffs and their amici rely on and endorse judicial review. (*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 625 (*Cal Trout I*)). The statute upheld in *Cal Trout I* was geographically limited and supported by evidence that the Legislature considered flow conditions and fishery resources in the particular river system at issue. (See sections IV.A.2, VI.C, *post.*) While deference may be appropriate for such a statute, it is not appropriate for section 5937 as misread by plaintiffs: a statewide, fact-free reasonableness determination contrary to this Court’s reasonableness case law. (See section VII.A, *post.*)

quoting *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 354 (*Long Valley*); see ABOM 33–34 [citing seven other decisions from this Court].)

Given those clear statements, no amicus or party seriously disputes that reasonableness is fact-specific. One amicus feints disagreement, only to concede the point. Trout Unlimited argues real parties “invent[ed] out of whole cloth” that reasonableness is fact-specific. (Trout Unlimited ACB 18–19.) But it then endorses that very position: “Since the question of whether a use of water is reasonable depends in no small part on what impacts it has on other uses, a final reasonable use determination cannot be made until the full contours of a flow regime to keep fish in good condition have been quantified.” (Trout Unlimited ACB 29.)⁴

All parties agree: constitutional reasonableness is fact-specific. And the record is clear, the trial court declined to consider the facts and make a reasonableness determination, believing it had “no jurisdiction” to do so. (12 AA 2786.) That agreement calls for dismissal or affirmance.

C. Amici confirm that the deference and burden-of-proof questions are not before this Court.

Rather than defend the trial court’s no-jurisdiction holding, amici opine on what reasonableness review might look like—how

⁴ The only other semblance of resistance on this point comes from the Attorney General and California Trout. They argue that, while reasonableness is generally fact-specific, the Legislature can displace that feature. (AG ACB 35; Cal Trout ACB 53.) Real parties later explain the flaws with this interpretation of the self-executing constitutional requirement. (Section VI.B, *post*.)

legislative pronouncements affect reasonableness, and which party bears the burden. (See AG ACB 39–49; Cal Trout ACB 18, 37, 46; Trout Unlimited 25–33; Winnemem ACB 45; CWIN ACB 9.) This Court need not reach those questions.

First, because the trial court found it lacked jurisdiction to assess whether plaintiffs’ relief was constitutional, *no reasonableness review has occurred*. (ABOM 38–39.) The burden question cannot matter on this record. Plaintiffs insisted in the trial court that no review should occur, so they presented *no evidence* bearing on reasonableness; real parties presented reams. (ABOM 27–28, citing 7 AA 1382–1661; 8 AA 1666–1945; 9 AA 1950–2014; 10 AA 2300–2306; 11 AA 2313–2368.)⁵ Trout Unlimited admits its musings about the burden and sequence of proof are “not implicated by the current posture of the case.” (Trout Unlimited ACB 13.)

Second, though plaintiffs’ amici insist there were deference and burden-of-proof holdings below, they cannot agree on what those holdings were. (See AG ACB 46–47 [court held deference would be due]; CWIN ACB 3 [court “would eliminate any role [f]or the Legislature”]; Trout Unlimited 10 [same]; Cal Trout ACB 32, 40, 46 [court both recognized legislative “primacy” and required reasonableness to be decided “without regard” for the

⁵ That said, and despite the trial court concluding real parties raised constitutional reasonableness, the Attorney General suggests real parties failed to raise the issue below. (ABOM 21, 65.) Amici, who are meant to assist the Court on *legal* questions, have no comparative advantage over the parties in parsing the record—something the Attorney General nonetheless tries to do throughout his brief, albeit inaccurately.

Legislature].) The opinion is narrow: it held only that injunctive relief requested under section 5937 is not exempt from constitutional reasonableness review—which hasn’t occurred. (*Bring Back the Kern v. City of Bakersfield* (2025) 110 Cal.App.5th 322, 356–357 (BBTK).)

Third, threshold legal flaws in plaintiffs’ section-5937 claim spare the courts from reaching these questions. Neither plaintiffs nor their amici cite any evidence that section 5937 was intended as a “reasonableness determination.” (Section III, *post*.) Nor does section 5937 impose any writ-enforceable duty on the City, because the state’s wildlife agencies have not ordered downstream flows below any of the weirs. (Section IV, *post*.) This case does not involve a Legislature-versus-judiciary battle; it involves plaintiffs and amici misreading a statute to create an enforcement tool the Legislature never authorized.

Fourth, reaching these questions would not provide needed guidance on any recurring issue. Neither plaintiffs nor amici identify a single statute resembling what they imagine section 5937 to be: a *statewide* reasonableness determination made *without considering* the facts of a particular stream system.⁶ This Court has no reason to decide how review of that hypothetical statute might proceed—because it does not exist.

⁶ Amici gesture to some statutes, but they are not remotely on point. (See section VI.E, *post*.)

D. Changed circumstances are not required for dismissal.

To escape the consequences of their concessions, the Attorney General echoes plaintiffs’ argument that this Court may dismiss review *only if* there are post-grant changed circumstances. (RBOM 16–17; AG ACB 62.) Even if such a threshold requirement existed, the across-the-board agreement by all parties on the core issue would still warrant affirming the Court of Appeal’s opinion. But this procedural argument flouts this Court’s guidance that it may dismiss for a “variety” of reasons. (ABOM 30.) It also contradicts dismissal practice. The United States Supreme Court recently dismissed review as improvidently granted because a closer review showed that “[a]ll the parties . . . agree[d]” on two key issues and the questions the petitioner pressed had not been “passed upon below.” (*Hamm v. Smith* (2026) 608 U.S. ____ [146 S.Ct. 1251, 1255–1256] (conc. opn. of Sotomayor, J.).) Those conditions hampered the Court’s ability to give “any meaningful guidance.” (*Id.* at p. 1255.)⁷ So too here: all agree section 5937 is not exempt from constitutional reasonableness review, and no such review has occurred.

⁷ Real parties rely on this as persuasive authority because, when this Court dismisses review as improvidently granted, it customarily does so in “an order that says simply that ‘review is dismissed.’” (*Advisory Com. com.*, 23 pt. 4 West’s Ann. Codes, Rules (2017 ed.) foll. rule 8.528(b), p. 304.)

II. If the Court goes beyond the issues decided by the Court of Appeal, it should decide all legal questions bearing on whether plaintiffs can show a likelihood of success on the merits.

Having urged this Court to reach questions not presented, amici then ask it to sidestep threshold legal flaws in plaintiffs' claim. CWIN asks the Court to assume the Legislature intended section 5937 as a reasonableness determination. (CWIN ACB 8.) The Attorney General asks the Court to assume private parties may enforce section 5937 without any agency order. (AG ACB 49–50 & fn. 11.) The Court should decline.

First, amici turn constitutional avoidance on its head. This Court routinely interprets *statutes* to “avoid[] the serious constitutional questions that would arise” from a contrary interpretation. (*People v. Bankston* (June 1, 2026, S044739) ____ Cal.5th ____ [[2026 WL 1530539](#), at p. *46] (*Bankston*), emphasis added.) CWIN and the Attorney General would have the Court adopt an untenable interpretation of the *Constitution* to apply a mere statute, which gets constitutional avoidance exactly backwards.⁸

Second, this Court often resolves legal issues embedded in issues presented. (See, e.g., *SeaBright Ins. Co. v. US Airways, Inc.* (2011) [52 Cal.4th 590, 601–602](#) [granting review to decide *effect* of violating nondelegable duty but “reject[ing] the premise” and holding there was *no such duty*]; *Lakin v. Watkins Associated*

⁸ Winnemem similarly argues the Court should contort the *constitution* to avoid rendering section 5937 (as plaintiffs misinterpret it) unconstitutional. (Winnemem ACB 42.)

Industries (1993) 6 Cal.4th 644, 662 [deciding “integrally related” question along with “principal issues on review”].) This is the Court’s first water-law case in over 25 years. It should not decide it under amici’s artificially cramped posture.

Third, “ [i]n a number of cases, this [C]ourt has decided issues raised for the first time before [it], where those issues were pure questions of law, not turning upon disputed facts, and were pertinent to a proper disposition of the cause or involved matters of particular public importance.’ ” (*County of Santa Clara v. Superior Court* (2023) 14 Cal.5th 1034, 1046, fn. 5.) Amici offer no reason to depart from that practice. The proper interpretation of section 5937 is a pure question of law. And it is—as the volume of amicus briefs on both sides confirms—one of broad public importance. If the Court goes beyond the narrow issues decided by the Court of Appeal, it should give section 5937 its best (and constitutional) interpretation now.

III. Amici have not shown that Fish and Game Code section 5937 was enacted “in the furtherance of” the 1928 amendment.

Plaintiffs’ position hinges on the assumption that section 5937 is a statewide legislative reasonableness determination. (E.g., OBOM 35.) Amici, like plaintiffs, *assert* as much. (E.g., AG ACB 23–24, 30–31; Cal Trout ACB 18, 32–33, 37.) Nothing in section 5937’s text or legislative history shows such an intent. (ABOM 39–42.) No amicus has proffered any evidence to the contrary, presumably because none exists.

Nor do amici contest that the Legislature knows how to expressly invoke the 1928 amendment’s in-furtherance clause when it intends to. (ABOM 39–41, 61.) Indeed, the Attorney General admits this is the Legislature’s practice but argues there is “no requirement” that the Legislature do so. (AG ACB 29.) The argument assumes the conclusion. Because the Attorney General asserts that the Legislature *intended* to make a “legislative determination of reasonable use,” it believes the Court need not concern itself with the absence of any express invocation like that seen in numerous other statutes. But the Court’s “fundamental task” when interpreting a statute “is to ascertain the Legislature’s intent and effectuate the law’s purpose.” (*Kaanaana v. Barrett Business Services, Inc.* (2021) [11 Cal.5th 158, 168.](#)) Against the backdrop of these other statutes, the *lack* of any invocation of the in-furtherance clause or any language of reasonableness is evidence against the idea that was the Legislature’s intent. (ABOM 39–40.)

Failure to establish this key premise defeats plaintiffs’ and amici’s arguments. With no legislative reasonableness determination, there is nothing for a court to defer to.

IV. Section 5937 does not impose a mandatory duty on all dam owners but is part of a three-option framework for regulating dams.

Real parties provided extensive argument—supported by statutory text, legislative history, and the norms of statutory interpretation—that section 5937 is not a universal, writ-enforceable mandate on all dam owners but an integral part of a

three-option statutory framework that California’s wildlife agencies can enforce. (ABOM 44–54.) Amici insist real parties’ interpretation is wrong, but they do not engage with the arguments. Instead, they ignore them, divert to other statutes, and conjure fanciful practical difficulties.

A. Amici do not engage with real parties’ argument about statutory structure or history.

1. Amici ignore that, dating to 1872, any duty to direct downstream flows required an agency order.

The Attorney General suggests it is real parties’ “*assumption* that earlier versions” of section 5937 imposed a duty only after an agency order. (AG ACB 57, emphasis added.)⁹ Other amici quote earlier versions while omitting the language limiting them to agency-ordered dam owners. (See Cal Trout ACB 22 [contending 1915 version applied to “dam owners”]; Trout Unlimited ACB 15–16 [similar descriptions].)

This feature of the legislative history is not debatable. Real parties detailed the statutory language and provided the earlier versions in their motion for judicial notice. (ABOM 48–51; 1 MJN 198 [1872], 214 [1903], 221 [1915], 230–231 [1917].) The 1917 version required an “order in writing,” applied only “where the state board . . . require[d] such fishways to be provided,” and provided for a hearing after “any order” to construct a fishway,

⁹ Plaintiffs’ only engagement is likewise to paint real parties’ showing as a mere “assumption” and assert without explanation “it does not” hold. (RBOM 43–44.) That failure to offer any reasoned argument in an oversized brief speaks for itself.

build a hatchery, or plant fish. (1 MJN 230–231.) Going into 1933 and 1937, a duty to provide downstream flows arose only *after* an agency order. Amici’s silence does not make that fact disappear.

2. Amici ignore the “in lieu of” language creating the three-option framework.

Amici ignore the statutory-structure features that defeat plaintiffs’ reading. No amicus acknowledges that section 5937 is part of a framework *directed at* the wildlife agencies—not dam owners. (§ 5930.) Nor does any amicus address the language vesting the wildlife agencies with discretion to order dam owners to take two other fish-maintenance options “in lieu of” fish passage with a flow requirement. (§§ 5938, 5942.)¹⁰

The Attorney General dismisses the three-option framework as a “purported” feature, arguing that “*nothing* in sections 5938–5942” suggests planting fish and building hatcheries are alternatives to fish passage with sufficient flows. (AG ACB 54–55, emphasis added.) That argument ignores the “in lieu of” language. (§§ 5938, 5942; see ABOM 47–48.) If one thing is permissible *in lieu of* another, they are alternatives.

The Attorney General contends that—even if fish planting and hatchery building are alternatives to fishways—they are not alternatives to section-5937 flows. (AG ACB 55.) Under that construction, section 5937’s minimum-flow duty applies even

¹⁰ The Attorney General’s previously undisclosed 1973 opinion emphasized both these features to conclude that these sections vest discretion in the wildlife agencies to order one of three fish-maintenance options. (See section V.B., *post*; Supp. MJN 39–40.)

when the wildlife agencies order a different fish-maintenance option or no action. Legislative action from nearly 70 years ago forecloses that theory.

Section 5946 was prompted by the wildlife agencies' conditioning approval of two dams on the dam owner "establishing [a] hatchery"—option two in the three-option framework. (*Cal Trout I, supra*, 207 Cal.App.3d at pp. 595–596; see § 5938.) The Legislature statutorily vetoed that action, dictating that "Section 5938," the hatchery-construction option, "shall not be applicable to dams constructed in District 4 ½." (§ 5946.) Instead, all permits, licenses, and dam approvals in that district must be conditioned on "full compliance with Section 5937." (*Ibid.*) Had a hatchery been only "in lieu of" a fishway (and *not* the flow requirement), section 5946 would have been unnecessary.

Letters to the Governor while section 5946 was pending also foreclose the Attorney General's theory. The Department of Fish and Game read section 5946 as "mak[ing] it *mandatory*" that dam owners in the affected district "allow sufficient flow to maintain fish life." (2 MJN 559, emphasis added.) The Legislative Counsel referenced section 5937's flow requirement, described the hatchery alternative, and summarized section 5946 as making the hatchery option "not . . . applicable" in the affected district. (2 MJN 553.) And the Department of Public Works opposed the bill because section 5946-mandated "*releases* ... for the use of fish" overrode the Fish and Game Commission's ability to order other options when option one was "impractical."

(2 MJN 536, emphasis added; see §§ 5933 [dam owner entitled to hearing on whether fishway is “practicable”], 5938 [may order hatchery when first option is “impracticable”].)

Beyond flouting the statutory text, the Attorney General’s insistence that hatcheries and fish planting are *in addition to* section 5937, rather than “in lieu of” it, defies common sense. Those options are environmental offsets: when the wildlife agencies find that particular downstream flows cannot be allowed, they may order dam owners to augment the state’s wildlife resources by other means—including in *other locations*. (See § 5938 [hatchery on “site to be selected by the department”].)

3. Amici ignore real parties’ evidence of a codification error in 1933.

Amici argue that language tweaks from the 1933 codification make section 5937 universal. (AG ACB 50–51; Winnemem ACB 37.) But no amicus acknowledges—let alone grapples with—real parties’ showing that the 1933 codification was expressly nonsubstantive. (ABOM 51–53.)

Before the 1933 codification, the three-option framework was all part of a single statute: [former Penal Code section 637](#). It required the wildlife agencies to “examine” dams; empowered them “to order in writing” that a dam owner construct a fishway; and gave the agencies discretion to order a hatchery or fish planting “in lieu of” a fishway. (1 MJN 230.)

Now-section 5937’s minimum-flow requirement came within the paragraph exclusively about fishway orders. (1 MJN 230 [first paragraph].) In the sentence after granting such

fishway authority, the statute provided: “[I]t shall be incumbent upon the [dam] owners . . . , *where the state board of fish and game commissioners require such fishways to be provided*” to “allow sufficient water at all times to pass through *such* fishway to keep in good condition” downstream fish. (*Ibid.*, emphasis added.) The section’s subsequent paragraphs then moved on to the hatchery and fish-planting options. (1 MJN 231 [second, third, and fourth paragraphs].)

But in 1933, the Legislature adopted the Fish and Game Code—prepared by the Code Commission, which was “not authorized, nor [was] it intended, to propose substantive changes in the law involving questions of policy.” (2 MJN 296; see ABOM 51–53.) Nonetheless, the codification made two language tweaks that inadvertently obscured the flow requirement’s link to an agency order. It split the one comprehensive fishway paragraph into several separate sections. (2 MJN 376.) And it changed “*such* fishway” in the minimum-flow language to “*a* fishway.” (*Ibid.*, emphasis added.) Plaintiffs and amici largely rest their interpretation on the premise that language tweaks in 1933 substantively severed the minimum-flow requirement from any agency order. (AG ACB 50–51; Winnemem ACB 37.) But again, the Code Commission’s changes were expressly nonsubstantive. (2 MJN 296; see ABOM 51–53.)

4. The Attorney General asks this Court to discard probative legislative history.

The Attorney General urges this Court to ignore legislative history altogether because, in its view, section 5937 is

unambiguous in isolation. (AG ACB 57.) But this Court has repeatedly held: “[E]ven if [a section] appears to have a clear and plain meaning when considered in isolation, [it] may nonetheless be rendered ambiguous when the language is read in light of the statute as a whole or in light of the overall legislative scheme.” (*People v. Valencia* (2017) 3 Cal.5th 347, 360 [collecting cases].) At minimum, real parties have shown ambiguity—from the optionality built into the statutory scheme, the redundancy plaintiffs’ reading creates with section 5946, and the outlier status section 5937 would assume in water law if plaintiffs were right. Consideration of legislative history is proper.¹¹

B. The Attorney General’s attempt at downplaying the sweeping nature of plaintiffs’ interpretation is unconvincing.

Plaintiffs’ reading of the 1933 codification and 1937 amendment—which assumes the Legislature obliquely expanded section 5937 from agency-ordered dams to all dams—violates the “‘no-elephants-in-mouseholes’ ” canon. (ABOM 55–57.)

The Attorney General protests that it is “highly questionable” whether such an expansion triggers the canon. (AG

¹¹ The Attorney General’s newfound disfavor for legislative history departs from its routine reliance on it. Consider some examples, all from recently argued cases. (E.g., Amicus Curiae Brief, *J.M. v. Illuminate Education, Inc.* (July 9, 2025, S286699) 2025 WL 2605614, at pp. *6, *15–*18, *28 & fn. 34; Opening Brief on the Merits, *People v. Espino* (Sept. 29, 2025, S286987) 2025 WL 4718609, at pp. *25–*28; Opening Brief on the Merits, *People v. Cofer* (Jan. 16, 2025, S286297) 2025 WL 4677561, at pp. *38–*46.)

ACB 58.) Other amici prove it does. Cal Trout estimates California has over 1,500 dams. (Cal Trout ACB 56.) Winnemem concedes plaintiffs’ reading of section 5937 “would reframe the regulatory paradigm.” (Winnemem ACB 35.) The Legislature would not have worked a paradigm-reframing change affecting thousands of dams by inserting one ambiguous phrase into section 5937, while leaving intact a statutory structure that vests the wildlife agencies with discretion over whether and how to regulate specific dams.

C. The other Fish and Game Code sections raised by the Attorney General do not disprove real parties’ interpretation.

Rather than engage real parties’ interpretation of section 5937, amici divert to other sections of the Fish and Game Code.¹² Those sections do not undermine real parties’ interpretation, and in some cases they merely provide more evidence for it.

1. Sections 5935 and 5936

The Attorney General argues section 5937 must apply to all dams because [sections 5935](#) and [5936](#)’s prohibitions on impeding or tampering with a fishway are “not clearly limited to fishways *ordered*” by the wildlife agencies. (AG ACB 54, fn. 12, emphasis

¹² The Attorney General does *not* endorse plaintiffs’ section-5901 argument. (See RBOM 48–49.) That argument fails and, in fact, has been summarily adjudicated against plaintiffs—as real parties explain. (Supp. MJN 48–57; Mem. ISO Supp. MJN 10–12.)

added.) This argument merely highlights the 1933 codification errors.

The 1933 codification—intended to make no substantive amendments—changed “*such* fishway” in now-section 5937 to “*a* fishway.” (ABOM 51–53; [ante](#), [section IV.A.3](#).) The same happened with now-[sections 5935](#) and [5936](#), which formerly read:

[I]t shall be incumbent upon the owners or occupants of all dams or artificial obstructions, *where the state board of fish and game commissioners require such fishways to be provided*, to keep the same in repair and open and free from obstructions to the passage of fish at all times; and no person shall wilfully destroy, injure, or obstruct any *such* fishway.

(1 MJN 230, emphasis added.) Just like section 5937, the agency-order link was obscured by expressly nonsubstantive changes.¹³

2. Sections 5943 and 5944

The Attorney General next argues that [sections 5930](#) through [5942](#) cannot form a three-option framework because [sections 5943](#) and [5944](#) “appl[y] *independent*” of any agency order. (AG ACB 56, emphasis added.) But those provisions apply

¹³ The recent Court of Appeal decision the Attorney General cites (*Water Audit California v. Merced Irrigation Dist.* (2025) [111 Cal.App.5th 1147](#)) does not address this legislative history. Furthermore, that opinion contemplates that remand will involve complex disputes over regulatory actions regarding the fishway in that case—issues not addressed in that early appeal from a demurrer. (*Id.* at pp. [1157](#), [1169–1179](#).)

to all dams because they are consistent with any of the three options (flows, hatchery, or fish planting) or no action.

[Section 5943](#) confers a right of fishing access “to the waters impounded by [a] dam,” and [section 5944](#) makes dam owners not liable for certain injuries to such fishers. The three-option framework concerns downstream fish; these sections provide fishing access upstream in the impounded water.

What’s more, while these provisions exist outside the three-option framework, they still require agency discretion. [Section 5943](#)’s right of access is “subject to the regulations of the commission.” This Court has highlighted the discretion in [section 5943](#) and the constitutional provision it implements. (*State of California v. San Luis Obispo Sportsman’s Assn.* (1978) [22 Cal.3d 440, 448](#).) Fishing access “must yield in appropriate factual situations,” and access is “subject to reasonable regulation and could in fact be extinguished if public recreational fishing were to become incompatible with [a] reservoir’s function as a domestic water supply source.” (*Ibid.*)

Relying on this Court’s precedent, a Court of Appeal recently held that agency discretion in [section 5943](#) prevents private parties from enforcing it by writ of mandate. (*Dummer v. City and County of San Francisco* (May 29, 2026, A172588) [120 Cal.App.5th 1009 \[2026 WL 1506437, at p. *8\]](#), reh’g. den. June 16, 2026.) Instead, the dam owner could consider environmental and public-health factors, conduct environmental review, and seek regulatory approvals for a well-managed fishing program that preserves the reservoir’s other beneficial uses.

The agency discretion is even greater—and a writ even less available—under the three-option framework with its “in lieu of” alternatives. The Attorney General’s reliance on [sections 5943](#) and [5944](#) thus reinforces that this area belongs first to agency discretion, not private party litigants.

3. Section 5946

No amicus addresses real parties’ argument that plaintiffs’ interpretation would render [section 5946](#) superfluous. (ABOM 57–58.)

The Attorney General insists [section 5946](#) rebuts the three-option framework because, after [section 5946](#)’s enactment, agency action is no longer required in District 4 ½. (AG ACB 56–57.) That’s precisely the point. [Sections 5930](#) through [5942](#) create a statewide system giving the wildlife agencies discretion to require one of three options. Dissatisfied with how the agencies exercised that discretion in District 4 ½, the Legislature displaced the three-option framework for that single district and mandated option one: downstream flows. ([§ 5946, subd. \(a\)](#) [barring hatchery option]; see 2 MJN 559 [wildlife agencies explaining that [section 5946](#) “*ma[de] it mandatory* that the operators of power dams in Inyo and Mono counties allow sufficient flow to maintain life” (emphasis added)].) Outside [section 5946](#)’s coverage, that directive must come from the wildlife agencies exercising discretion under the three-option framework or from an independent legislative enactment directed at a specific system.

4. Section 5948

The Attorney General argues [section 5948](#)'s prohibition on creating a "log jam or debris accumulation" undermines the three-option framework. (AG ACB 56.) Again, the Attorney General proves real parties' argument. If there was any doubt, [section 5948](#) states it does not apply to "a dam for the storage or diversion of water." (§ 5948.) It also applies only "as determined by the commission," *not* by private parties. So too with section 5937.

D. The Attorney General's imagined practical issue with real parties' interpretation is nonsensical.

The 1937 amendment to now-section 5937 gave dam owners another option for complying with an agency order to ensure fish passage and minimum flows. (ABOM 53–54.) A dam owner subject to an option-one order need not incur the costs of constructing a fishway if other means for fish and water passage are available. (*Ibid.*)¹⁴

The Attorney General argues that a fishway and the alternatives in section 5937 (passage "over, around or through the dam") have "distinct purposes." (AG ACB 52–53; see RBOM

¹⁴ Thus, after the 1937 amendment, an option-one order is simply to ensure fish passage and flows—whether through a fishway or through other means. Amici misstate real parties' position when they argue that real parties' interpretation of section 5937 applies only if the agencies have "ordered the *construction of a fishway*." (E.g., Trout Unlimited ACB 11, emphasis added.)

39.) But fish live in water. A means of water passage—say, a culvert—can also allow fish passage. The Attorney General eventually concedes as much, acknowledging that water and fish passage “overlap.” (AG ACB 53; see AG ACB 52.)

Trout Unlimited agrees with real parties that fish and water passage are often interchangeable: the “simplest way to read” the 1937 amendment is that “it allows the owner of a dam that lacks a fishway to pass water over, around, or through the dam instead of having to construct a fishway just to release the flow.” (Trout Unlimited ACB 21.)

E. Amici’s federal cases engage in no statutory interpretation of section 5937.

Amici cite federal court cases as supporting a universal interpretation of section 5937. (AG ACB 27–28, 62; Cal Trout 30–31.) The cases are neither binding nor on point, as none determined whether section 5937’s flow requirement applies apart from an agency order. The cases rejected arguments that *other laws* displaced what defendants assumed was a section-5937 duty. (See *San Luis & Delta-Mendota Water Authority v. Haugrud* (9th Cir. 2017) [848 F.3d 1216](#), [1234](#) [whether permit restriction barred application of section 5937]; *Natural Resources Defense Council v. Patterson* (E.D.Cal. 1992) [791 F.Supp. 1425](#), [1427–1428](#), [1431](#) [whether section 5937 applied to the federal government under 43 U.S.C. § 383], *affd.* and remanded *sub nom.* *Natural Resources Defense Council v. Houston* (9th Cir. 1998) [146 F.3d 1118](#) [same].)

Amici repeatedly ignore this Court’s reminder that “it is well settled that language contained in a judicial opinion is ‘to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not therein considered.’ ” (*People v. Banks* (1993) 6 Cal.4th 926, 945.)

V. This Court should exercise its independent judgment and interpret section 5937 de novo.

A. Deference is not automatic, as the Attorney General insists.

Ultimately, the Attorney General falls back on a request for deference to its or the wildlife agencies’ interpretation of section 5937. (See AG ACB 60–61.)

Deference is “not automatic.” (*Shear Development Co., LLC v. California Coastal Com.* (2026) 19 Cal.5th 334, 351 (*Shear Development*)). Courts exercise “independent judgment” on legal questions like statutory interpretation and grant only the level of deference—if any—that is “‘appropriate’ ” under the circumstances. (*Id.* at p. 350, quoting *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8 (*Yamaha*)).

Courts assess two sets of factors: “whether ‘the agency has a comparative interpretive advantage over the courts’ ” and “‘whether the interpretation in question is probably correct.’ ” (*Shear Development, supra*, 19 Cal.5th at p. 352, quoting *Yamaha, supra*, 19 Cal.4th at p. 12.) These include:

- Whether the agency has relevant expertise;¹⁵
- Whether “the agency authored and enforces the language in dispute.”
- Whether the agency interpretation is “long-standing”; and
- Whether the agency interpretation was “ ‘contemporaneous with the legislative enactment of the statute being interpreted.’ ”

(*Shear Development, supra*, 19 Cal.5th at pp. 353, 356, quoting *Yamaha, supra*, 19 Cal.4th at pp. 12–13.)

These factors foreclose deference to the Attorney General’s or the wildlife agencies’ belatedly adopted—and unenforced—interpretation. This Court should independently interpret section 5937 and reject amici’s reading.

B. No deference is due to the Attorney General’s changing interpretation.

The Attorney General was not involved in drafting now-section 5937; it points to no evidence it has ever enforced that statute through litigation; its interpretation has vacillated; and it first adopted something resembling its current position decades after the relevant statutory language was added. The Attorney General has no interpretive advantage over this Court.

¹⁵ Declining to defer to the wildlife agencies, this Court has explained this factor’s limited effect: “Even in substantive areas of the agency’s expertise, however, our deference to an agency’s statutory interpretation is limited; determining statutes’ meaning and effect is a matter ‘lying within the constitutional domain of the courts.’ ” (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 236.)

1937 opinion. The Attorney General first interpreted now-section 5937 in 1937, a few years after the statute had been codified in 1933 with the language tweaks plaintiffs and amici contend universalized the flow requirement. (Supp. MJN 7–8.)

The wildlife agencies asked the Attorney General whether they “could require” the federal government “to construct a fishway over such dam, or in lieu thereof, if the same were impracticable, a fish hatchery.” (Supp. MJN 7.) The Attorney General’s opinion answered no, based on intergovernmental immunity. (Supp. MJN 7–8.)

But the framing of the wildlife agencies’ question shows the executive branch did not share plaintiffs’ and amici’s view that, after the 1933 codification, section 5937 applied to *all* dams independent of agency action. The opinion instead addressed whether the wildlife agencies could issue an order to the federal government. (See Supp. MJN 7 [addressing whether the wildlife agencies “*could require*” a fishway *or* hatchery if a fishway “were impracticable” (emphasis added)].) That agency-action-based understanding supports real parties.

1949 opinion. A legislator asked the Attorney General whether legislation was needed to make fish protection a beneficial use. (Supp. MJN 9.) Though the Attorney General referenced in passing now-section 5937 as “requir[ing] the release of water behind dams,” it opined only that section 5937 supports an inference that fish protection is a *beneficial* use. (*Ibid.*) If the Attorney General believed fish maintenance was, as plaintiffs

and amici now insist, categorically the first-priority *reasonable* use below any dam, it would have said so.

1951 opinion. The Attorney General considered whether section 5937 essentially reflected a “‘legislative intent under no circumstances ever to render dry any portion of a stream channel.’” (Supp. MJN 13.) It answered *no*. (Supp. MJN 13–14.)

Such a categorical interpretation “contravene[d] fundamental principles of the law of waters.” (Supp. MJN 13.) It clashed with Water Code [section 106](#), which classifies domestic and irrigation uses as the highest uses. (*Ibid.*) And it conflicted with other laws requiring agencies to consider and balance environmental effects—not elevate them above all other considerations. (Supp. MJN 14–15.)

1970 opinion. When answering a question about now-[section 5943](#), the Attorney General offered conflicting dicta about section 5937. (See Supp. MJN 18–19.) In one place, it seemed to portray the minimum-flow requirement as following agency action—noting that “*the* dam” owner at issue had a duty to ensure flows after reaching an agreement with the wildlife agencies. (Supp. MJN 19, emphasis added.) Elsewhere, it suggested the flows requirement is universal—applying below “*a* dam.” (*Ibid.*, emphasis added.) No reasoning comes with either characterization.

But the opinion’s actual reasoning—on the question it addressed—highlighted many of the same features real parties detail here. The opinion acknowledged the three-option framework the Attorney General now disclaims. (Supp. MJN 19.)

It noted that the dam-regulation statutory sections must be harmonized, since many originally formed a single section. (*Ibid.*) And it reasoned that the as-codified version of the dam-regulation statutory scheme must be read consistently with the 1917 version—since the 1933 codification was expressly nonsubstantive. (Supp. MJN 20.)

1973 opinion. The Attorney General again considered section 5937. (Supp. MJN 30–43.) Its analysis resembles real parties’ interpretation.

In a dry year, a water-rights holder intended to divert “the entire flow of the Kern River,” bypass Lake Isabella, use the water for power generation, and then return it downstream. (Supp. MJN 34–35.) The Attorney General opined on how it believed the Fish and Game Code applied to that diversion. (Supp. MJN 30.)

The Attorney General concluded that the “Code provides *alternative methods* of fish preservation.” (Supp. MJN 38, emphasis added.) The wildlife agencies have “*discretion*” to “require that any owner of a dam release sufficient water to allow the passage of fish,” but “the operation of a fish hatchery and the purchase and planting of young fish are *acceptable alternatives*.” (*Ibid.*, emphasis added.) “It is the duty of the Commission to determine in any particular factual setting which alternative method of fish preservation will be applied.” (*Ibid.*) And again: “The statutory scheme allows considerable leeway to the Commission to determine in any given factual setting the most

practical means to achieve the goal of fish preservation.” (Supp. MJN 40.)

The Attorney General also pointed to similar aspects of the statutory structure as real parties. It emphasized that [section 5930](#) imposes a duty not on dam owners but the wildlife agencies. (Supp. MJN 39.)¹⁶ And it emphasized the “in lieu of” language as conferring discretion. (Supp. MJN 38–39.)

Though it described section 5937’s language as “unequivocal,” the opinion’s *application* of that statute turned on agency action. (Supp. MJN 42–43.) Having been informed *by the wildlife agencies* that a particular water temperature and dissolved oxygen level was required to protect a particular fishery, the opinion concluded the state could enforce section 5937 to mandate such downstream flows. (*Ibid.*) But as to whether section 5937 (without more) required sufficient water passage to allow trout passage and spawning, the opinion answered no and emphasized the wildlife agencies’ discretion: “Again, the planting of young fish and the construction and maintenance of a fish hatchery are acceptable alternatives if the Fish and Game Commission so approves.” (Supp. MJN 43.)¹⁷

¹⁶ The opinion interprets the *wildlife agencies’* duty to examine dams as mandatory. (Supp. MJN 40.) Perhaps then, private litigants could bring a writ of mandate against those agencies to compel them to exercise their discretion as to a particular dam—though they could not compel *whether* an agency order is issued or *which* of the three options it would take. (See, e.g., *Hollman v. Warren* (1948) [32 Cal.2d 351, 355.](#))

¹⁷ The Attorney General’s reasoning for answering yes in the first scenario but no in the second is admittedly terse. But these

1974 opinion. The next year, the Attorney General considered whether the Water Board could adopt a regulation (discussed below) requiring *future* water-appropriation permits to leave enough unappropriated water for below-dam fish. (Supp. MJN 44.)

The Attorney General quickly answered yes (Supp. MJN 44–45), based on the broad delegation for the Water Board to make rules (Wat. Code, [§ 1058](#)) and statutes requiring it to consider the “relative benefit” of “all beneficial uses” when acting on permit applications (*Id.*, [§ 1257](#)), including instream uses like fish protection (*Id.*, [§§ 1243, 1243.5](#)).

In dicta, the Attorney General reconsidered its 1951 opinion, concluding that section 5937 must be given “a literal interpretation.” (Supp. MJN 47.) It did not analyze section 5937’s statutory context or legislative history. Nor did it explain its departure from its opinion issued just a year before. (See *Jones v. Lodge at Torrey Pines Partnership* (2008) [42 Cal.4th 1158, 1170–1171](#) [conclusory interpretation by agency entitled to little weight].) The 1974 opinion’s own caveats also keep it from reaching this case. The Attorney General stressed that, because the regulation applied only to *future* permit applications of unappropriated water, it would not affect vested rights. (Supp.

differing results and the opinion’s overall emphasis on agency discretion rejects plaintiffs’ and amici’s position that section 5937 applies to every dam without the need for agency action. It also rejects the notion that section 5937 can be directly enforced by private plaintiffs against the dam owner.

MJN 46.) Here, real parties *have* vested water rights dating back over a century. (ABOM 26; 6 AA 1339–1341; 8 AA 1812.)

Lack of enforcement. The Attorney General fails to identify even one case where it sought to enforce section 5937. It brings no relevant expertise or experience.

C. No deference is due to the wildlife agencies’ interpretation.

The wildlife agencies likewise request deference, while admitting they have “not brought many lawsuits directly enforcing the statute.” (AG ACB 60.) They point to *none*.

The agencies identify no formal interpretation of section 5937—let alone one close in time to the 1933 codification and 1937 amendment. The earliest source they cite is a 1998 amicus brief. (AG ACB 60.) That brief takes no position on whether private plaintiffs can enforce section 5937. It objected to a party’s argument only “*to the extent* it would prevent the *State Amici* from bringing civil actions to enforce Section 5937 . . . or would preclude the [Water] Board from applying Section 5937 in the Board’s administrative, water rights proceedings.” (Amicus Curiae Brief, *Putah Creek Council v. Solano Irrigation District* (May 21, 1998, C025527) [1998 WL 34341373](#), at p. *24, emphasis added.)

The wildlife agencies note they appear before the Water Board to urge it to weigh fish impacts when deciding whether to issue a water permit. (AG ACB 60.) That shows the opposite of plaintiffs’ categorical interpretation: the agencies using water law’s ordinary balancing to secure environmental protections.

The wildlife agencies lack any longstanding interpretation of section 5937 to which this Court should defer.

D. The Water Board’s exercise of its policy discretion under a broad delegation does not inform how to interpret section 5937.

The Attorney General also urges deference to the Water Board’s supposed interpretation of section 5937 in California Code of Regulations, [title 23, section 782](#). (AG ACB 37.)¹⁸

That provision is a “quasi-legislative” regulation adopted under a delegation to enact rules for the Water Board to balance competing beneficial uses when it decides whether to issue a permit for unappropriated water. (See *Yamaha, supra*, [19 Cal.4th at p. 11](#); see Supp. MJN 44–45 [Attorney General’s similar description of authority for regulation].) An agency’s policy judgment on a properly delegated subject stands so long as it is not arbitrary or capricious. (*Yamaha, at p. 11*.)

How the Water Board exercises its policymaking discretion when acting on permits says nothing about what section 5937 independently means. (ABOM 58, fn. 21.) The regulation was a prophylactic choice to ensure that, for future permit applications, minimum flows for fish are preserved *or* other fish-protection measures adopted. (*Ibid.*) It does not support plaintiffs’ categorical reading of section 5937 as a per se reasonableness

¹⁸ The Water Board is not an amicus. But as other amici have shown, the Water Board conducts a fact-specific reasonableness inquiry when considering proposed flows under section 5937. (ACWA ACB 32–33.)

determination in all circumstances; it again shows water law's normal balancing process protecting instream uses.

E. No deference is owed to a flawed law review article written by board members of a plaintiff.

California Trout—along with plaintiffs—relies on an academic article by two of plaintiff Water Audit California's advisory board members. (Cal Trout ACB 22–23, 25, 27; OBOM 28–29 & fn. 5, 30 & fn. 9, 60 & fn. 13; RBOM 40, 44–45; see ABOM 51, fn. 19.) This Court has often discounted “‘advocacy-based law review articles.’” (ABOM 51, fn. 19.) It should do so once again. The article suffers from basic errors and critical omissions.

For example, Cal Trout—like plaintiffs—echoes the article's argument that the 1937 amendment to section 5937 responded to the Attorney General's 1937 opinion concluding section 5937 did not apply to federal dams. (Cal Trout ACB 22–23; RBOM 44–45, citing Börk et al., *The Rebirth of California Fish & Game Code Section 5937: Water for Fish* (2012) [45 U.C. Davis L.Rev. 809, 844–845](#) (hereafter Börk).) But the bill was introduced six months *before* the Attorney General Opinion and passed both houses *before* the opinion. (Compare 2 MJN 409, 413 [bill introduced in January and sent to Governor in May] with Supp. MJN 7 [opinion issued in June].)

Timing aside, the bill was also unresponsive to the reasons why the Attorney General concluded section 5937 did not apply to the federal government. (See Supp. MJN 7–8.) The bill left untouched a definition of “dam owner” that excluded the federal

government, and United States Supreme Court precedent had long held that the federal government is exempt from state police powers. (E.g., *State of Arizona v. State of California* (1931) 283 U.S. 423, 451–452 [51 S.Ct. 522, 75 L.Ed. 1154] [applying immunity doctrine to dams].) This proffered interpretation of the 1937 amendment fails.

The article also paints the early versions of the statute as universal, despite express language requiring an agency order; never mentions section 5930 directing the dam-regulation framework at the wildlife agencies; never considers the tension between its interpretation and the Legislature’s later passage of section 5946; and, across 105 pages, mentions the “in lieu of” language just once in one footnote. (See Börk, *supra*, 45 U.C. Davis L.Rev. at pp. 809–913 & fn. 66.) This blinders-on approach deserves no weight.

VI. Amici do not rebut real parties’ showing that, if section 5937 meant what plaintiffs say, it would be unconstitutional.

A. This Court’s precedent establishes that reasonableness is necessarily relative to each particular stream system.

Section 5937, as plaintiffs misinterpret it, would be facially unconstitutional. This Court has repeatedly explained that constitutional reasonableness is fact-*specific*. (ABOM 33–35; *ante*, section I.B.) Plaintiffs and amici insist section 5937 is a fact-*free* reasonableness determination made without considering the facts and circumstances in any particular stream system. Such a

statute would flout the 1928 amendment’s requirement that legislation be “in the furtherance” of its policy. (ABOM 59–64.)

Amici’s attempts to resist this conclusion all fail.

B. Amici cannot evade this Court’s fact-specific reasonableness cases.

First, some amici argue that this Court’s interpretation of constitutional reasonableness does not bind the Legislature. In their view, the constitutional reasonableness mandate is a chameleon: though it generally requires fact-specific analysis, it changes color to validate *anything* the Legislature labels reasonable. (See AG ACB 35; Cal Trout ACB 35, 50–54.) Cal Trout says this Court’s precedent applies only “absent legislative direction” and suggests “every law regarding water uses is arguably a determination of reasonableness.” (Cal Trout ACB 36, 53.) It elsewhere maintains the self-executing nature of the reasonableness mandate is met so long as “some deliberative body” thinks it so. (Cal Trout ACB 44.)

That is not how a self-executing constitutional requirement works. This Court is the final arbiter of the California Constitution’s meaning, and the Legislature cannot disregard that interpretation. (Cal. Const. Scholars ACB 12–18.) The Attorney General’s own examples of self-executing provisions expose the problem. (AG ACB 43–44.) No one would say Equal Protection Clause precedent gives way if the Legislature declared a sex-discriminating statute lawful.

Second, Cal Trout’s fact-by-fact distinctions of this Court’s early cases miss the point. (Cal Trout ACB 50–54.) The disputes

differed; the rule being applied did not. This Court stated the governing principle broadly and repeatedly: reasonableness turns on the facts and circumstances of each case. (ABOM 33–34.) “All uses of water, including public trust uses, must now conform to the standard of reasonable use.” (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443 (*National Audubon*).)

Third, Cal Trout disputes real parties’ reading of this Court’s early water law cases, including *Tulare*, as not concerning reasonableness. (Cal Trout ACB 52.) That case expressly discussed “the doctrine of reasonable use” “embodied in the constitutional amendment.” (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 525 (*Tulare*).) This Court later relied on *Tulare* for the precise rule real parties invoke:

It is well established that what is a reasonable use of water varies with the facts and circumstances of the particular case. ([*Tulare, supra*, 3 Cal.2d at p. 567]; [citation].) 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*]), nor can it be made “*in vacuo* isolated from statewide considerations of transcendent importance.”

(*Long Valley, supra*, 25 Cal.3d at p. 354.) Cal Trout’s sentence-by-sentence quibbles notably do not extend to the above from *Long Valley*—which this Court has repeated multiple times. (See ABOM 34.) Amici’s silence on this Court’s clearest statements

confirms their constitutional theory contradicts binding precedent.

C. The statutes and Court of Appeal opinions cited by amici do not endorse statewide reasonableness determinations.

The Attorney General, like plaintiffs, contends the Legislature may impose “per se” and “general” rules for reasonable use, by which it means rules that pay no heed to specific conditions or comparative water uses. (AG ACB 37; see, e.g., OBOM 50, 52, 58.) It claims that several Court of Appeal decisions have upheld such rules. (AG ACB 35–37, citing *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) [50 Cal.App.5th 976, 1004](#) (*Stanford Vina*); *Light v. State Water Resources Control Bd.* (2014) [226 Cal.App.4th 1463, 1484–1485](#) (*Light*); *Cal Trout I*, *supra*, [207 Cal.App.3d at pp. 593, 622–625](#).) If the political branches had adopted such rules or the Court of Appeal so held, it would conflict with the constitutional standard of reasonable use, which is “necessarily relative.” (*Meridian, Ltd., v. San Francisco* (1939) [13 Cal.2d 424, 447](#); see ABOM 33–35.) It would also conflict with this Court’s construction of the limits of the Legislature’s powers in *Long Valley*, *supra*, [25 Cal.3d 339](#) and would merit disapproval by this Court. (ABOM 59–61.)

But the Court of Appeal did not make the error the Attorney General now asks of this Court. Neither plaintiffs nor their amici have produced *one* example of such a categorical rule, and the examples they tout contradict their own position. (ABOM 61–62.) As real parties have shown, the regulations at issue in

Stanford Vina and *Light* were tailored by the Water Board to apply to specific stream systems, under specific conditions, to address specific fishery concerns arising at the time. (*Ibid.*) Rather than engage with the facts of the cases, the Attorney General talismanically repeats the words “per se rules” and “general rules” from the opinions without discerning what the Court of Appeal meant. (AG ACB 33, 35, 37.)

A closer examination of those opinions reveals nothing contrary to real parties’ position. The regulations at issue in *Stanford Vina*, which applied only to specific creeks, “made any diversion of water *from those creeks* unreasonable per se under [article X, section 2](#), *where* the diversion would cause or threaten to cause the flow of water to fall below the minimum flow requirements.” (*Stanford Vina, supra*, [50 Cal.App.5th at p. 996](#), emphasis added.) Those minimum-flow requirements were detailed in the regulations and based on the specific conditions in the subject creeks. (*Id. at p. 990.*) The primary holding in *Stanford Vina* was that the Water Board was not required to hold an evidentiary hearing and act quasi-adjudicatively on every individual diversion but could instead act quasi-legislatively by “defining diversions of water *under certain emergency circumstances* to be per se unreasonable.” (*Id. at p. 1004*, emphasis added.)

The regulations at issue in *Light*, which applied only to the Russian River, were both specifically tailored to that river system and provided expressly for further localized planning among smaller groups of diverters. (*Light, supra*, [226 Cal.App.4th at pp.](#)

1473–1476; see Cal. Code Regs., [tit. 23, § 862](#).) The *Stanford Vina* court described the regulations at issue in *Light* as “declaring diversions of water for purposes of frost protection to be per se unreasonable *when done in contravention of the regulation*.” (*Stanford Vina*, *supra*, [50 Cal.App.5th at p. 1002](#), emphasis added.) In both cases, the Court of Appeal approved an exercise of regulatory power that addressed the specific situation on the subject stream systems, as required by the Constitution.

The Attorney General also cites *Cal Trout I* as upholding a “per se” rule. But as real parties have shown, the statute upheld in *Cal Trout I* was localized to the streams in District 4 ½ and based on a Legislative assessment of specific conditions in those streams. (ABOM 42–43.) The Attorney General argues that [section 5946](#) would not meet the standard put forward by the real parties and by this Court’s prior jurisprudence, because it “applies to an entire fish and game district encompassing multiple streams and watersheds across two counties.” (AG ACB 37 [citing map in appendix of *Cal Trout I* opinion].) The details of District 4 ½ and the question of [section 5946](#)’s constitutionality are not before the Court here, but reference to the map in the appendix to *Cal Trout I* and the text of the opinion make clear that the systems are interconnected and that the Legislature conducted hearings on projects that would have affected the entire area. (*Cal Trout I*, *supra*, [207 Cal.App.3d at pp. 596–597](#),

633.)¹⁹ The entire *purpose* of fish and game districts is to allow “regulations adopted by the Legislature for the protection of the fish and game [that are] in some measure commensurate with the various kinds and species of fish and game existing in the different parts of the state.” (*In re Makings* (1927) 200 Cal. 474, 479; see Cal. Const., art. IV, § 20.)

In short, the Attorney General asks the Court to endorse a nonexistent legislative practice. The Legislature has enacted laws that provide for fact-intensive, system-by-system determinations to achieve the policy of the 1928 Amendment. Not only do the regulations from *Light* and *Stanford Vina* confirm this consistent approach, so do the statutory examples presented by the plaintiffs. (ABOM 61.) The Legislature’s and Water Board’s actual practice aligns with real parties’ interpretation and with *Long Valley*. It does not need to, and has not attempted to, enact the sort of “per se” rules advocated for by the Attorney General.

D. Amici misinterpret Justice Shenk’s *Herminghaus* dissent.

The Attorney General argues that Justice Shenk’s dissent in *Herminghaus* supports its position that the Legislature can make blanket reasonableness determinations. (AG ACB 19–20.)

¹⁹ *Cal Trout I* acknowledged the stream-specific nature of [section 5946](#) and confirmed judicial review is proper even for that type of statute—albeit with some deference. If its phrase “*manifestly unreasonable*” differs from this Court’s approach to judicial review in *Long Valley*, it should be disapproved in the proper case. (Cal. Const. Scholars ACB 17–18, 20, fn. 40.) However, this Court need not reach that issue here because section 5937 as plaintiffs misread it is not a stream-system-specific statute.

It is true that Justice Shenk argued that the “Legislature has the right in the first instance to prescribe the standards” of reasonable use. (*Herminghaus v. Southern California Edison Co.* (1926) 200 Cal. 81, 124–125 (*Herminghaus*) (dis. opn. of Shenk, J.)) But that language must be understood in its context. Justice Shenk’s point was simply that he believed the Legislature could extend the *reasonableness* requirement to riparian rights. (*Id.* at pp. 124–125, 130–131.) That requirement, in turn, already had well-defined content: “What is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case.” (*Lux v. Haggin* (1886) 69 Cal. 255, 394, emphasis omitted; see Northern Cal. Water Association ACB 17–24.) Justice Shenk was arguing that all water uses must be subject to the same fact-specific rule. The Justice’s position is contrary to plaintiff’s and the Attorney General’s claim that the Legislature can make statewide reasonableness determinations without factual context.

Beyond that, the 1928 amendment did not “merely overturn *Herminghaus*” or adopt Justice Shenk’s dissent—it “establishe[d] state water policy.” (*National Audubon, supra*, 33 Cal.3d at p. 443.) “All uses of water, including public trust uses, must now conform to the standard of reasonable use.” (*Ibid.*, emphasis added.) And “[i]t is well established that what is a reasonable use of water varies with the facts and circumstances of the particular case.” (*Long Valley, supra*, 25 Cal.3d at p. 354.)

The Legislature may not make laws contrary to that policy, only laws “in furtherance” of it. (Cal. Const., [art. X, § 2.](#))²⁰

Yet plaintiffs and amici ask for an exemption from that “state water policy.” (*National Audubon, supra*, [33 Cal.3d at p. 443.](#)) Such a rule is beyond the Legislature’s power under the 1928 Amendment. The Court should reject that request just as it rejected a similar argument in *National Audubon*. (*Id.* [at pp. 445–446](#) [rejecting argument that “the public trust is antecedent to and thus limits all appropriative water rights, an argument which implies that most appropriative water rights in California were acquired and are presently being used unlawfully”].)

E. Other statutes do not help amici.

Amici argue other supposedly statewide reasonableness determinations undermine the fact-specific requirement. They identify no comparable statute.

Cal Trout offers the same list of statutes as plaintiffs. (OBOM 60–61; Cal Trout ACB 34.) Each statute requires fact-specific findings and balancing. (ABOM 61.)

The Attorney General cites Water Code section 1508.5. (AG ACB 35.) There is no such section, but presumably he meant Water Code [section 1058.5](#), which empowers the Water Board to quickly adopt “emergency regulations.” But this section also requires the board to make findings, including that the

²⁰ Indeed, the Legislature rejected an alternative version of the amendment that would have given the Legislature broader discretion, and the People rejected another amendment proposed for that same purpose in 1934. (ABOM 65–66.)

regulation responds to “conditions which exist, or are threatened, in a critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years or during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act ... based on drought conditions.” (*Id.*, § 1058.5, subd. (a)(2).) Such regulations are valid for only up to one year without further findings. (*Id.*, § 1058.5, subd. (c)(1).) The Attorney General cites no example of an emergency regulation that purported to make statewide reasonableness determinations. In fact, the Water Board’s practice is to use this authority to address emergencies in a *deeply* fact-intensive manner: for instance, the regulations in *Stanford Vina*. (See *Stanford Vina*, *supra*, 50 Cal.App.5th at pp. 988–992; *ante*, section VI.C.)

Cal Trout flags the California Wild and Scenic Rivers Act²¹ (Rivers Act) as supposedly supporting plaintiffs. (Cal Trout ACB 34–35.) The statute proves the opposite. It provides that precisely defined segments of 16 enumerated rivers “shall be preserved in their free-flowing state.” (Pub. Resources Code, §§ 5093.50–5093.55.) It then expressly makes a reasonableness finding: “The Legislature declares that such use of *these rivers* is the highest and most beneficial use and *is a reasonable and beneficial use of water within the meaning of Section 2 of Article X of the California Constitution.*” (*Id.*, § 5093.50, emphasis added.)

²¹ As discussed in section IX.B, *post*, this statute is separate from the *federal* Wild and Scenic Rivers Act, under which the majority of the Kern River is designated as protected.

Unlike plaintiffs’ reading of Fish and Game Code section 5937, the Rivers Act operates at the stream-system and fact-specific level—as constitutional reasonableness requires. The Legislature’s express invocation of the Constitution for those *stream-specific* findings makes it implausible that it made a *statewide* reasonableness finding by implication in Fish and Game Code section 5937. The addition or reclassification of rivers or segments of rivers requires further legislation (Pub. Resources Code, [§ 5093.546](#)), and a state agency is required to prepare detailed reports in support (*id.*, [§ 5093.547](#)).

Winnemem discusses the Delta Reform Act. (Winnemem ACB 31–32.) But that statute—like the Rivers Act—fits real parties’ explanation of water law. The Legislature made findings detailing the circumstances unique to a particular region and then formed an agency to develop a plan with which local land-use and planning decisions in that region must comply. (Wat. Code, [§§ 85001–85004, 85022–85023, 85200](#).) That place-specific framework is nothing like plaintiffs’ statewide, fact-free interpretation of [Fish and Game Code section 5937](#).

Cal Trout notes many statutes declare certain uses *beneficial*. (Cal Trout ACB 35.) That illustrates real parties’ point. Beneficial use can be addressed in the abstract; it asks whether a use is generally worthwhile. Reasonableness is different; it asks whether a specific use is justified in a particular context. The Attorney General and Trout Unlimited brush aside the implications of that fact in light of Water Code [section 1243](#), which declares fish preservation a *beneficial* use. (AG ACB 30–

31; Trout Unlimited ACB 37–38.) Neither engages with real parties’ argument: if the Legislature made fish maintenance categorically *reasonable* in 1937 or before, why did the Legislature and wildlife agencies think it necessary in 1959 to clarify that fish maintenance is a *beneficial* use? (ABOM 42.) “Beneficial” is a lesser classification which is necessarily included in a “reasonableness” determination. The later adoption of Water Code [section 1243](#) is direct evidence that [Fish and Game Code section 5937](#) was not enacted as a reasonableness finding. (*Ibid.*)

Cal Trout’s fallback—that “every law regarding water uses is arguably a legislative determination of reasonableness” (Cal Trout 35–36)—cannot be right. Laws defining *beneficial* (not reasonable) uses or directing the Water Board to conduct fact-specific adjudications do not decide reasonableness for every water use in every stream system. Cal Trout’s preference to dispense with legislative intent highlights amici’s failure to find it.

Trout Unlimited cites Division 2, Part 2 of the Water Code (Wat. Code, §§ 1200–1851), which provides for permit proceedings before the Water Board. (Trout Unlimited ACB 38.) They note the language requiring the board to consider “the relative benefit” of different beneficial uses and consider what is in the public interest. (*Ibid.*, citing Wat. Code, [§§ 1243, 1253–1259](#).) Noting the lack of such language in Fish and Game Code section 5937, Trout Unlimited argues that the Legislature did not intend a “totality of the circumstances” test in Fish and Game Code section 5937, otherwise they would have included similar

language. (*Ibid.*) But this begs the question. If the Legislature did not intend to address the relative reasonableness of different uses of water or to enact a universal minimum flow requirement, one would not expect such language—particularly in a statute passed *before* the 1928 amendment. Furthermore, the precodification version of what is now-section 5937 provides for a fact-specific hearing on the practicability of a fishway order. (1 MJN 230–231; see ABOM 50–51.)

Ironically, Trout Unlimited’s argument also provides more support for real parties’ interpretation of Fish and Game Code section 5937. Division 2 of the Water Code, which includes Part 2, is expressly declared by the Legislature to be “in furtherance of the policy contained in Section 2 of Article X of the California Constitution.” (Wat. Code, § 1050.) So, to adapt Trout Unlimited’s argument: “[T]he Legislature knows how to write [a reasonableness determination or statute in furtherance of the policy of reasonable use] when it wants to. The Legislature did so for the appropriation of new water rights, but not for the operation of dams in section 5937.” (Trout Unlimited ACB 38–39.)

VII. No deference would be owed to the Legislature for the type of legal error real parties assert.

A. The level of deference depends on the type of asserted flaw: legal or factual.

If the Court reaches the deference question, it should reject plaintiffs’ one-size-fits-all approach. (ABOM 65–68.) Deference is contextual, depending on the constitutional flaw asserted. When

the Legislature examines a particular locale and makes a fact-specific reasonableness determination, a court reviews that determination deferentially. But when the Legislature misunderstands the substance of the reasonableness standard, a court reviews that legal error de novo. If plaintiffs are right that section 5937 is a fact-free, statewide reasonableness determination—when reasonableness must be fact-specific—this case falls in the latter category. No deference is warranted.

The Attorney General’s response confirms real parties’ point. The Attorney General objects (AG ACB 48) to real parties’ analogy to appellate review—where legal determinations receive de novo review and factual or discretionary determinations receive deference. (ABOM 66–67.) It offers judicial review of agency action as the better analogy. It’s the same.²²

“There are basically two alternative standards of judicial review” of agency action: “independent judgment” review for legal questions, and deferential review (“substantial evidence” or “abuse of discretion”) for factual and discretionary questions. (Asimow et al., [Cal. Practice Guide: Administrative Law \(The Rutter Group 2025\)](#) ¶ 17:1.) Consider this Court’s two-step

²² Indeed, “[m]odern administrative law is built on *the appellate review model* of the relationship between reviewing courts and agencies. The model was borrowed from the understandings that govern the relationship between appeals courts and trial courts in civil litigation—which in turn were derived from the relationship between judge and jury.” (Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law* (2011) 111 [Colum. L.Rev.](#) 939, 940, emphasis added [discussing similar federal standards].)

framework for assessing agency rulemaking pursuant to a delegation. Courts first ask whether the rule is “ ‘ ‘ ‘within the scope of the authority conferred,’ ” ’ ” and—if so—they ask whether the rule is “ ‘ ‘ ‘reasonably necessary to effectuate the purpose of the statute.’ ” ’ ” (*Yamaha, supra*, [19 Cal.4th at p. 11.](#))

Deference applies at step two but not step one. “[R]ules are reviewed independently for consistency with controlling law,” so a court does not defer to an agency’s view when deciding whether a regulation lies within the scope of delegated authority. (*Yamaha, supra*, [19 Cal.4th at p. 11, fn. 4.](#))

Section 5937, as plaintiffs misread it—a fact-free reasonableness determination—would conflict with the “controlling law” of the 1928 amendment, under which constitutional reasonableness is fact-specific. That legal mismatch requires de novo review, even if deference might apply to fact-specific reasonableness determinations untainted by threshold legal error.

The Attorney General’s two fallback arguments also fail. *First*, the Attorney General argues real parties have not shown section 5937 is unconstitutional in the “ ‘generality or vast majority of cases.’ ” (AG ACB 38–39.) But the legal defect is not sporadic. If plaintiffs’ interpretation is correct, section 5937 would *always* operate as a statewide, fact-free reasonableness determination. That defect exists in every application of the statute as plaintiffs construe it.

Second, the Attorney General suggests courts may ask only whether the Legislature did something expressly prohibited.

That is exactly the inquiry here. (AG ACB 28–29.) The 1928 amendment is self-executing and allows legislation only “in the furtherance” of its policy. Reasonableness has well-defined content: it is fact-specific. A fact-free statute cannot further that policy. The Attorney General sees no prohibition only because it starts from the premise that the “ ‘self-executing’ clause in [the 1928 amendment] is largely irrelevant.” (AG ACB 44.)

B. De novo review of legal questions does not violate the separation of powers.

Amici invoke separation-of-powers principles to suggest a constitutional problem with courts independently reviewing legal questions—here, whether section 5937 would square with the 1928 amendment. (AG ACB 48; Cal Trout 38; Winnemem ACB 15; see RBOM 14, 35, 51, 63.) That gets it backward. Interpreting the Constitution is the judiciary’s role. (Cal. Const. Scholars ACB 12–18.)

The opposite result—allowing the Legislature to displace judicial review—creates the separation-of-powers problem, as this Court just recognized in *Bankston*. The Constitution permits reversal only if an error produces a “miscarriage of justice.” (*Bankston*, *supra*, ___ Cal.5th ___ [2026 WL 1530539, at p. *46].) That inquiry is “ ‘case-specific.’ ” (*Id.* at p. *47.) When a litigant insisted a statute required automatic reversal, the Court construed the statute to avoid that result, sidestepping the “serious constitutional questions” posed by a legislative attempt “to override the [C]ourt’s constitutionally assigned role.” (*Id.* at p. *49.) The same principle controls here: it is plaintiffs’ and amici’s

effort to displace the courts—not real parties’ preservation of a core judicial role—that raises constitutional concerns.

Amici also argue there are separation-of-powers concerns with a standard that considers the factual record the Legislature compiled. But this Court has held deference is due to the Legislature’s constitutional interpretation only where it “enacted a statute with constitutional prescriptions clearly in mind” and made a “ ‘considered legislative judgment as to the appropriate reach of the constitutional provision.’ ” (*City of El Centro v. Lanier* (2016) [245 Cal.App.4th 1494, 1503](#) [municipal affairs case], quoting *Pacific Legal Foundation v. Brown* (1981) [29 Cal.3d 168, 180](#) [civil service case].) And this Court in some contexts has developed tests that look to the “factual record that the Legislature has compiled.” (*State Building & Construction Trades Council of California v. City of Vista* (2012) [54 Cal.4th 547, 558](#) [municipal affairs case]; see ABOM 33, fn. 9.) But even then, “ ‘the ultimate constitutional interpretation must rest, of course, with the judiciary.’ ” (*City of El Centro*, at p. 1503.)

Regardless, plaintiffs and amici have failed to refute that the Legislature gave no consideration to the conditions, beneficial uses, balance of public interests, or reasonableness of water use in the Kern River system past or present when it enacted section 5937. (ABOM 67.)

VIII. Independent grounds require reversal or modification of the preliminary injunction.

A. No amicus defends the injunction’s bonding or due process deficiencies.

Amici do not even discuss two other fundamental infirmities that the Court of Appeal found in the trial court’s orders: the failures to require a real bond and provide real parties’ notice and an opportunity to be heard. (*BBTK, supra*, 110 Cal.App.5th at pp. 357–367; ABOM 73.) These issues preclude plaintiffs’ and amici’s request to reinstate the injunction.

B. Amici’s conflicting positions on obey-the-law injunctions show why private litigation is ill-suited to enforce the Fish and Game Code.

The Court of Appeal identified yet another reversible error: the trial court issued an “‘obey-the-law’ ” injunction that did not quantify the required flows. (*BBTK, supra*, 110 Cal.App.5th at pp. 357–359.)

The Attorney General disagrees, likening the injunction to the “imprecise compliance” the Court of Appeal deemed “superior to no compliance” in *Cal Trout II*. (AG ACB 64.) Trout Unlimited goes further, saying *Cal Trout II* “order[ed] the defendant to immediately begin releasing minimum instream flows.” (Trout Unlimited ACB 22.) Not true. *Cal Trout II* did not immediately order the defendant to do anything. It ordered the *trial court* to “conduct[] a *hearing* to *specify* the release rates that would constitute compliance” with [section 5946](#). (*California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 211 (*Cal Trout II*), emphasis added.) The hearing was designed to give the dam

owner “guidance in release of the appropriate amount of water.” (*Id.* at p. 212.) The court directed the trial court to rely on the wildlife agencies’ “administrative expertise” in “determining the streamflows necessary to establish and maintain fisheries.” (*Id.* at p. 211.)

Even if amici were right about *Cal Trout II*, it must yield to this Court’s holding in *Tulare*. There, this Court held that a finding limiting a rights holder to “a ‘reasonable’ amount” of water “is clearly insufficient and a judgment based thereon must be reversed.” (*Tulare, supra*, 3 Cal.2d at p. 525.) The trial court “must fix the quantity.” (*Ibid.*) Water-use injunctions had to be quantified in 1935. They must be quantified today.

Trout Unlimited then falls back on policy. It says quantifying flows is too “complex” to burden plaintiffs. (Trout Unlimited ACB 22.) But it also says calculating flows is “not a herculean task,” given modern science. (Trout Unlimited ACB 24.) The asserted difficulty shifts with plaintiffs’ litigation needs.

As the parties seeking judicial relief, plaintiffs must bear that burden. (Evid. Code, § 500; *Savage v. Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1571; *Vaughn v. Coccimiglio* (1966) 241 Cal.App.2d 676, 678–679.) Amici largely avoid this basic procedural rule by focusing on who should bear the burden in the constitutional reasonableness analysis. (E.g., AG ACB 41–43; Trout Unlimited ACB 30; Winnemem ACB 43; CWIN ACB 6.) But, as Trout Unlimited recognizes, there are two questions: “how much flow fish need,” a scientific question, and whether requiring that flow is reasonable given the circumstances, a legal

question. (Trout Unlimited ACB 28.) Plaintiffs disclaimed any burden on *either* question. No amicus gives a coherent reason to excuse plaintiffs from proving the scientific question, particularly after Trout Unlimited assures the Court that doing so is not a “herculean task.” (Trout Unlimited ACB 24.)

Plaintiffs’ and amici’s inability to articulate an intelligible process for determining required flows shows why private litigation is a poor tool for resolving instream-flow disputes. “[T]he State of California, not only in the Water Code, but in the Fish and Game Code, has placed that responsibility upon public officials.” (*Rank v. Krug* (S.D.Cal. 1950) [90 F.Supp. 773, 801.](#))²³

IX. Amici’s parade-of-horribles rhetoric relies on extra-record evidence that misrepresents the facts and ignores the other environmental laws that protect public trust resources in California.

A. Amici improperly offer case-specific supposed facts from outside the record.

While amici are given some leeway to discuss certain extra-record facts, amici here go well beyond the “Brandeis brief.” (See *Rivera v. Division of Industrial Welfare* (1968) [265 Cal.App.2d 576, 589, fn. 20.](#)) Amici seek to adjudicate the conditions in the Kern River system (AG ACB 20–21; Winnemem ACB 20, 39; CWIN ACB 4), including through social media posts and newspaper articles (Cal Trout ACB 58–59 [citing news articles, plaintiff Bring Back the Kern’s website, and an Instagram post]).

²³ The San Joaquin Tributaries Authority’s amicus brief develops this point further.

“Amicus facts” should be limited to “legislative facts”—
“generalized claim[s] about the state of the world” such as social
statistics—rather than “adjudicative fact[s]”—“the who, what,
where, when facts of a dispute.” (Larsen, *The Trouble with
Amicus Facts* (2014) [100 Va. L.Rev. 1757, 1773–1775.](#))

Cases like this implicate serious scientific, historical, and
policy questions that deserve adjudication under the rules of
evidence, with opportunity for all sides to examine the
evidentiary record. Amici flout the first rule of appellate
procedure: “ ‘[I]f it is not in the record, it did not happen.’ ”
(*Jameson v. Desta* (2018) [5 Cal.5th 594, 609, fn. 11.](#)) This Court
should not credit plaintiffs’ assertions of extra-record facts.

For example, plaintiffs’ amici often refer to diversion of the
entire flow of the river, allegedly on a regular basis. (E.g., AG
ACB 21, 26; Winnemem ACB 20.) The Kern River system is very
large, originating high atop Mount Whitney with a drainage
basin that covers 2,074 square miles. (8 AA 1796; 11 AA 2356.)
“The river’s main fork, the North Fork, flows approximately 86
river miles in a southerly direction to its juncture with the South
Fork Kern River (approximately 94 river miles in length), where
it is impounded by Isabella Dam and Reservoir.” (11 AA 2356.)
Below Lake Isabella, “[t]he Kern River continues to flow for
approximately 33 river miles through a hydraulically steep
canyon to the floor of the San Joaquin Valley and into the eastern
city limits of Bakersfield.” (*Ibid.*) For an additional “10 river
miles *downstream* of the mouth of the Kern River canyon is the
‘First Point of Measurement’ ” and then yet further downstream

are the six diversion weirs targeted in plaintiff's complaint. (8 AA 1810; 11 AA 2356, emphasis added.)

Plaintiffs' complaint focuses on the weirs in the downstream-most portion of the river, much of which also maintains regular flows in many years. (1 AA 191 [complaint]; 8 AA 1806–1808 [mean and median monthly flows below measurement point just above weirs], 1810 [map].) Given the very early stage of the litigation when the injunction was issued, the factual record was not fully developed. In postinjunction proceedings, real parties presented evidence that absent *any* diversions for human use, in about 71 percent of years the Kern River channel “would have dried back at or above McClung Weir for at least four consecutive weeks.” (Supp. MJN 66–67.)

Amici also refer to a story in the *Los Angeles Times* describing “the mass die-off of thousands of fish in the Kern River after the Court of Appeal issued its decision, which allowed dam operators to reduce flows and dry up the riverbed.” (Cal Trout ACB 56–57.) It implies a causal connection: reduced flows resulted from the Court of Appeal's stay. But the article itself identifies a different cause: “[I]nfrastructure work, including maintenance of weirs and removal of sediment from the channel.” (James, *‘It’s really sad’: River dries up abruptly in Bakersfield, leaving thousands of dead fish* (Sept. 19, 2024) L.A. Times <<https://tinyurl.com/5n7eyezu>> [as of July 14, 2026].) The City publicly announced that project, done in compliance with mandates from the U.S. Army Corps of Engineers, which operates Lake Isabella and the Kern River channel as flood-

control facilities. (*City reducing water flows in Kern River for maintenance*, City of Bakersfield City News <<https://tinyurl.com/2yhmpbv5>> [as of July 14, 2026].) As the Attorney General recognized, those operations are essential to protect Bakersfield from the “devastating floods” that “periodically inundated the Kern Valley as far south as Bakersfield causing untold damage to both property and human life” before the construction of the dam. (Supp. MJN 34.)

These disputed factual assertions underscore the necessity for independent constitutional reasonableness review by the trial court of *all* the facts and circumstances, with a full and fair opportunity to litigate what those facts and circumstances are.

B. Amici overlook the many other statutes that protect California’s fish and rivers.

Amici finally resort to hyperbole. They warn that a ruling for real parties would “nullify” section 5937 (AG ACB 15); “eliminate any role for the Legislature” in water and environmental law (Trout Unlimited 10; accord, AG ACB 15); and “threaten,” “endanger,” or place “in doubt” the state’s “fish and rivers” (Cal Trout 19, 54, 65). None of that is true.

First, real parties’ argument does not “nullify” section 5937. It addresses *who* enforces the statute and *how*. The three-option framework gives the wildlife agencies discretion to order dam owners to take one of three options—downstream flows, a hatchery, or fish planting—subject to judicial review and substantive limits. It also requires dam-specific orders after an examination. [Fish and Game Code section 5937](#), in other words,

looks like typical water law. If plaintiffs and amici are right about the proper remedy here, they can seek it through proper channels. Furthermore, the reasonableness standard does not exclude consideration of appropriate measures to protect fish. Plaintiffs have pleaded a 1928-amendment claim they can pursue regardless. (14 AA 3257–3259.) The Water Board also has jurisdiction to police unreasonable uses. (Wat. Code, §§ 1052, 1831; see *Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 893–894.)

Second, amici’s dire warnings assume section 5937 is the only protection for fish and rivers. It is not. Other statutory and regulatory authorities abound to protect public trust resources while attending to the specifics of stream systems.

For instance, the wildlife agencies may “identify and list those streams and watercourses throughout the state for which minimum flow levels need to be established” to protect fish and wildlife. (Pub. Resources Code, § 10001.) They then propose requirements “specified in terms of cubic feet of water per second,” and the Water Board must consider them when acting on permit applications. (*Id.*, § 10002; Wat. Code, § 1257.5.)

As another example, the Rivers Act (discussed *ante*, section VI.E) bars most dams and diversion structures on certain rivers. (Pub. Resources Code, § 5093.55.) The state act was modeled on the earlier National Wild and Scenic Rivers Act, under which both the North and South Forks of the Kern River, upstream of Lake Isabella, have been preserved and protected from diversion and impoundment for decades. (16 U.S.C. § 1274, subd. (64); Pub.

[L. 100-174 \(Nov. 24, 1987\) 101 Stat. 924.](#)) Other statutes applicable to specific, sensitive systems include fish protection measures, including the Delta Protection Act of 1992 (Pub. Resources Code, [§§ 29701, 29763.5, 29765](#)) and the California Coastal Act (Pub. Resources Code, [§§ 30000, 30001, subd. \(c\), 30230, 30512, 30600](#)). Further protection of public trust resources arises from numerous general environmental statutes, such as the state and federal Endangered Species Acts (Fish & G. Code, [§§ 2050–2089.25; 16 U.S.C. §§ 1531–1544](#)) and fish-specific provisions of the California Environmental Quality Act (Pub. Resources Code, [§§ 21001, subds. \(c\) & \(d\), 21060.5](#); Cal. Code Regs., [tit. 14, § 15065, subd. \(a\)\(1\)](#)).

CONCLUSION

The Court should dismiss review or affirm the Court of Appeal's opinion reversing the trial court's issuance of a preliminary injunction. If the Court reaches the threshold statutory questions, it should hold that plaintiffs cannot seek a writ of mandate under section 5937 to enforce an injunction directing the flow of water in the Kern River.

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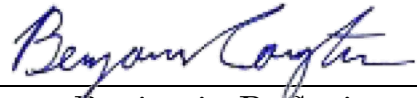
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Dated: July 20, 2026



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

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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.

7/20/2026

Date

/s/Benjamin Covington

Signature

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