Supreme Court of California
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Supreme Court of California
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No. S290840

IN THE SUPREME COURT OF CALIFORNIA

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

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

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

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

PLAINTIFFS' OPPOSITION TO SUPPLEMENTAL MOTION FOR JUDICIAL NOTICE FILED BY REAL PARTIES IN INTEREST

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INTRODUCTION

Plaintiffs and Respondents Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, Center for Biological Diversity, and Water Audit California (collectively, "Plaintiffs") oppose the Supplemental Motion for Judicial Notice ("SMJN") filed by Real Parties in Interest and Appellants North Kern Water Storage District, et al. ("Real Parties").

First, Real Parties' motion is a poorly veiled attempt to file an unpermitted sur-reply and bypass the page limits established by the Rules of Court. "Requests for judicial notice should not be used to 'circumvent[]' appellate rules and procedures, including the normal briefing process." (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1064, overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276, quoting *People v. Webster* (1991) 54 Cal.3d 411, 428, fn. 4.)

Second, Exhibits 1, 8, and 9 to Real Parties' motion are irrelevant to the narrow question before this Court. According to Real Parties, Exhibits 1 and 8 help show that Fish and Game Code section 5901 ("Section 5901") does not "support the [preliminary] injunction" at issue in this case. (SMJN, p. 10,

citing Joint Reply Brief of Plaintiffs and Respondents ("Reply Br."), pp. 47-48.) But Plaintiffs do not claim that it does. Plaintiffs discussed Section 5901 in *one paragraph* of their reply brief simply to show how Real Parties' argument—that compliance with the Fish and Game Code is unnecessary unless and until the Department of Fish and Wildlife issues a "fishway order"—is untenable in light of the rest of the statutory scheme governing the operation of dams. (Reply Br., pp. 47-48.)[1] Section 5901 is otherwise irrelevant to whether a plaintiff seeking to enforce Fish and Game Code section 5937 ("Section 5937") must affirmatively prove the statute's application is constitutional before a court may issue a preliminary injunction. The answer to that question—no—turns on the plain language of Section 5937, the plain language of article X, section 2 of the California

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[1] Real Parties feign offense that Plaintiffs "raised []this argument] for the first time before this Court in plaintiffs' reply brief on the merits." (SMJN, p. 7.) But Plaintiffs' reply brief responded to the novel "three-option framework" argument Real Parties raised for the first time in their answer brief on the merits. (Reply Br., pp. 35-50.) As Plaintiffs noted then, Real Parties failed to raise this argument in the Superior Court, in the Court of Appeal, and even in their answer to Plaintiffs' petition for review. (Reply Br., p. 36.) It is thus Real Parties' argument—not Plaintiffs' response thereto—that is untimely. (*Ibid.*)

Constitution ("Section 2"), and longstanding principles of statutory and constitutional construction.

Similarly, Real Parties ask this Court to consider a declaration that Real Parties submitted to the Superior Court in post-injunction proceedings. (SMJN Ex. 9.) But this Court is a court of review, not a factfinder. Even if it were, this Court could take judicial notice only of the existence of the declaration—not of the truth of the matters asserted therein. The existence of an extra-record declaration prepared after Real Parties appealed from the preliminary injunction is, by definition, irrelevant to the propriety of the injunction or to this appeal.

For these reasons, this Court should (i) decline to take judicial notice of Exhibits 1, 8, and 9 to Real Parties' motion, and (ii) strike and/or disregard the improper sur-reply arguments made in Section III of Real Parties' memorandum of points and authorities.

ARGUMENT

I. Real Parties improperly use their motion for judicial notice as a backdoor sur-reply.

This Court has long warned that judicial notice is not a tool "to 'circumvent[]' appellate rules and procedure." (*Mangini*,

supra, 7 Cal.4th at p. 1064, quoting *Webster*, supra, 54 Cal.3d at p. 428, fn. 4.) Yet that is precisely what Real Parties attempt to do through their supplemental motion. They spend nearly 600 words attacking Plaintiffs' reply brief, making an argument Real Parties only briefly allude to in their 13,992-word brief responding to amici curiae. (*Compare* SMJN, pp. 10-12 [arguing supposed flaws in "Plaintiffs' section 5901 argument"] *with* Real Parties' Consolidated Answer to Amicus Curiae Briefs ("RPAC Br."), p. 33, fn. 12 [citing Section 5901 only once in a footnote and referring to the SMJN for the substance of their argument].) Real Parties' motion thus serves both as an improper sur-reply and as an end-run around the word limit in Real Parties' actual brief. (See Cal. Rules Ct. Rule 8.520 [permitting no sur-reply and limiting briefs to 14,000 words].[2])

This Court should reject Real Parties' attempt to file an unauthorized, substantive brief and either strike or ignore the arguments made in Section III of Real Parties' motion.

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[2] Real Parties' motion also does not meet the requirements of a supplemental brief under Rule 8.520(d), because Exhibits 1 and 8 were both available to Real Parties when they filed their answer brief on the merits on February 11, 2026.

II. Exhibits 1, 8, and 9 are not relevant to the narrow question before this Court.

Even if Real Parties' arguments were permissible, their contentions related to Exhibits 1 and 8 would be irrelevant. Real Parties claim, incorrectly, that Plaintiffs assert in their reply brief that Fish and Game Code section 5901 provides an alternative basis to support the trial court's preliminary injunction, and then complain that Plaintiffs failed to inform this Court of a subsequent Superior Court ruling on Plaintiffs' 5901 claim. (SMJN, pp. 10-12 & Ex. 8.)

Plaintiffs' reply brief makes no such assertion. Plaintiffs did briefly discuss Section 5901 in response to Real Parties' new argument that dam owners need not comply with Section 5937 unless and until the Department of Fish and Wildlife issues a "fishway order." (Reply Br., pp. 47-48.) But Plaintiffs simply observed that Section 5901's plain language makes it unlawful to obstruct fish passage whether or not the Department has issued a "fishway order." (*Id.* at p. 48.)[3]

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[3] Real Parties' misrepresentation of Plaintiffs' argument reveals their confusion about the purposes of sections 5901 and 5937:

Real Parties' argument for judicial notice thus attacks a straw man. Plaintiffs' reply brief did not argue that Section 5901 provides a separate basis to uphold the preliminary injunction issued under Section 5937, or that Section 5901 is enforceable through mandamus, because neither of those issues is before the Court.[4] Real Parties' arguments for introducing Exhibits 1 and 8 are not relevant to the question presented for review and are not responsive to any arguments made by any party or amicus.

Similarly, Real Parties' factual arguments about Kern River flows are inappropriate for this stage of the litigation. Real Parties argue that Exhibit 9 disproves amici's claims that Real Parties' "diversions cause the Kern River to run completely dry." (SMJN, p. 12.) But this Court is not acting as a factfinder. The

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Section 5901 regards fish *passage*, while Section 5937 regards *flows*. (Fish & Game Code §§ 5901, 5937.) The two are not the same. (See Reply Br., pp. 38-41; Amicus Brief of the Attorney General and Department of Fish and Wildlife, pp. 52-53.)

[4] To be clear, Plaintiffs disagree with the Superior Court on whether Section 5901 imposes a duty enforceable in mandamus. Notably, the Superior Court distinguished Section 5937 from Section 5901 on this ground, repeatedly emphasizing that Section 5937 *does* impose a mandatory duty. (SMJN Ex. 8, pp. 55-56, 57.) The Superior Court also affirmed that under Section 5901, "it is unlawful to put something in a stream that does or could impede fish passage." (*Id.*, p. 56.)

Superior Court specifically found that "the vast majority of the Kern River water between First Point and the Calloway Weir has been diverted away from the river for agricultural use. As a result, the riverbed downstream of the Calloway Weir is completely dry throughout most of the year." (Appellants' Appendix, vol. 12, p. 2774.) This Court should accept those factual findings, not reweigh them, particularly against a late-filed declaration that does not appear in the appellate record. (See Joint Opening Br. of Plaintiffs and Respondents, p. 17, fn. 3.)

The Court cannot take judicial notice of the *truth* of the assertions in Exhibit 9 in any event. "Courts may not take judicial notice of allegations in affidavits, declarations and probation reports in court records because such matters are reasonably subject to dispute and therefore require formal proof." (*South Lake Tahoe Property Owners Group v. City of South Lake Tahoe* (2023) 92 Cal.App.5th 735, 752.)

Judicial notice of Exhibits 1, 8, and 9 is therefore inappropriate. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2 ["any matter to be judicially noticed must be relevant to a material issue"].) This Court should

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court (i) decline to take judicial notice of Exhibits 1, 8, and 9 to Real Parties' Supplemental Motion for Judicial Notice, and (ii) strike and/or disregard the improper sur-reply arguments made in Section III of Real Parties' memorandum of points and authorities.

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PROOF OF SERVICE

Bring Back the Kern, et al. v. City of Bakersfield, et al.
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On July 31, 2026, I served true copies of the following document(s) described as:

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BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

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

Executed on July 31, 2026, at Union City, California.

David Weibel

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 7/31/2026 by M. Chang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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

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

7/31/2026

Date

/s/David Weibel

Signature

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