CASE NO. S290840 10.691.02

IN THE SUPREME COURT OF THE STATE 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 to Plaintiffs
Kern County Superior Court Case No. BCV-22-103220
The Honorable Gregory A. Pulskamp, Judge Presiding

APPLICATION TO FILE, AND PROPOSED BRIEF, OF PROPOSED *AMICI CURIAE* WINNEMEM WINTU TRIBE, SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION, NORTH COAST RIVERS ALLIANCE, AND CALIFORNIA SPORTFISHING PROTECTION ALLIANCE IN SUPPORT OF PLAINTIFFS AND RESPONDENTS BRING BACK THE KERN, ET AL.

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APPLICATION TO FILE PROPOSED AMICI CURIAE BRIEF

To the Honorable Patricia Guerrero, Chief Justice of this Court:

Proposed *Amici Curiae* ("Amici") Winnemem Wintu Tribe ("the Tribe"), San Francisco Crab Boat Owners Association ("Association"), North Coast Rivers Alliance ("Rivers Alliance"), and California Sportfishing Protection Alliance ("Sportfishing Alliance") hereby request leave to file an amici curiae brief in this case in support of the Plaintiffs and Respondents Bring Back the Kern, et al.

Proposed Amici are a Native American Tribe and public interest environmental and fishing organizations that represent a broad spectrum of Native Americans, conservationists, recreationists, fishermen and women, and scientists vitally interested in protecting and restoring the natural flows, historically abundant fish and wildlife, and associated public trust uses of the Sacramento and San Joaquin Rivers and their tributary rivers and streams, including the Kern River whose long-diverted flows and imperiled fish and wildlife this litigation seeks to restore. The interests of each of the Proposed Amici in the subject matter of this litigation are summarized below.

The Winnemem Wintu Tribe is a Native American Tribe recognized by the State of California whose aboriginal territory encompasses the upper watersheds of the Sacramento River including in particular the McCloud River. The Tribe's cultural identity is inextricably linked to the McCloud and its salmon. Indeed, "Winnemem" is the Tribe's name for the McCloud River, along whose banks the Tribe has lived in harmony with nature from time

immemorial. Construction of Shasta Dam on the Sacramento River in 1944 flooded many of the Tribe's ancestral lands and cultural sites, and prevented salmon from migrating to and from the McCloud River. The resulting loss of the chinook ("king") salmon fishery, on whom the Tribe had historically relied for sustenance and spiritual strength, crippled the Tribe's ability to engage in its traditional subsistence and religious practices. Subsequent erection and mismanagement of the McCloud Dam upstream on the McCloud River further encroached upon the Tribe's traditional lands, harmed the river's native fishery, and impeded the Tribe's ability to continue and restore its historic cultural practices. Both dams obstruct and hamper ongoing efforts to reestablish the McCloud River's native salmonid fishery.

The San Francisco Crab Boat Owners Association is a California corporation whose members operate small, family-owned fishing boats that harvest Dungeness crab, wild California King salmon, herring and other local species that live in the cold waters of San Francisco Bay and the Pacific Ocean. Formed in 1913 to protect that historic fishery for sustainable harvest, the Association has been practicing conservation management for more than a century to ensure the rich seafood fisheries of the Bay and the Pacific continue to feed future generations of Californians. Construction and mismanagement of dams on rivers tributary to San Francisco Bay has destroyed and degraded habitat needed by the salmonid and other fisheries on which the Association's members depend for their

livelihoods. Its members are harmed by dam owners who fail to allow sufficient water to pass over, around or through the dams on these tributaries to keep in good condition fish that exist below these dams.

The North Coast Rivers Alliance is a non-profit unincorporated association with members throughout Northern California. It was formed three decades ago to protect California's rivers and their watersheds from the harmful effects of excessive water diversions, poor dam operation, pollution, and other forms of environmental degradation. To that end, the Rivers Alliance's members regularly participate in public hearings and online and zoom meetings regarding, and review and submit comments concerning, proposals by local, state and federal agencies to construct, raise, or alter the operation of dams on California rivers. They use and enjoy California's rivers and watersheds for recreation, aesthetic enjoyment and scientific study, and are harmed by dam owners who fail to allow sufficient water to pass over, around or through the dam to keep in good condition fish that exist below these dams.

The California Sportfishing Protection Alliance is a non-profit corporation organized under California law whose thousands of members (including those belonging to its member organizations) reside and recreate throughout California. The Sportfishing Alliance's members are duly licensed sport fishing anglers committed to the preservation and enhancement of California's public trust fisheries and enforcement of environmental laws. They have been

involved for decades in public education and advocacy efforts to protect and restore California's rivers and are harmed by dam owners who fail to allow sufficient water to pass over, around or through the dams to keep in good condition fish that exist below these dams.

All four Amici have been engaged for decades in educational and advocacy activities before state and federal administrative agencies and state and federal courts to save the imperiled fish and wildlife species that inhabit the Delta and its tributaries from extirpation. The judicial proceedings Amici have brought have resulted in many published rulings pertinent to the obligations of dam owners and operators and water diverters to manage California's rivers in a manner that protects their fisheries, including, for example, the following:

State Water Resources Control Board Cases (2006) 136 Cal.App.4th 674 (set aside approval of Delta diversions that reduce flows needed for fish and wildlife);

California Sportfishing Protection Alliance v. Federal Energy Regulatory Commission, 472 F.3d 593 (9th Cir. 2006) (held that the federal Endangered Species Act § 7 (16 U.S.C. § 1536) applies to "affirmative" agency acts or authorizations);

Pacific Coast Federation of Fishermen's Associations v. United States Department of the Interior, 929 F.Supp.2d 1039 (E.D.Cal. 2013) (addressed whether the federal Bureau of Reclamation's ("Reclamation's") water delivery contracts violated the National Environmental Policy Act ("NEPA"));

Pacific Coast Federation of Fishermen's Associations v. U.S. Department of the Interior, 996 F.Supp.2d 887 (E.D.Cal. 2014) (upheld Reclamation's water delivery contracts (reversed; see below));

North Coast Rivers Alliance v. Westlands Water District (2014) 227 Cal.App.4th 832 (held that Westlands Water District's approvals of interim water delivery contracts with Reclamation were exempt from the California Environmental Quality Act ("CEQA") because initial water deliveries antedated CEQA's enactment);

North Coast Rivers Alliance v. A.G. Kawamura (2015) 243 Cal.App.4th 647 (held that California's statewide plant pesticide program impacting Delta violated CEQA);

Pacific Coast Federation of Fishermen's Associations v. U.S. Department of the Interior, 655 F. App'x 595 (9th Cir. 2016) (held that Reclamation's interim water delivery contracts violated NEPA);

Pacific Coast Federation of Fishermen's Associations v. Glaser, 945 F.3d 1076 (9th Cir. 2019) (held that farm drainage commingled with non-farm sources may require Clean Water Act discharge permits);

Delta Stewardship Council Cases (2020) 48 Cal.App.5th 1014 (held that Delta Plan must include enforceable performance targets);

Westlands Water District v. All Persons Interested (2023) 95 Cal.App.5th 98 (upheld trial court's refusal to validate Westlands Water District's contract for water deliveries with Reclamation).

The Rivers Alliance has also assisted this Court by filing

amicus curiae briefs addressing agency duties to comply with California's environmental laws such as CEQA. For example, it filed an amicus curiae brief in the matter *Protecting Our Water and Environmental Resources v. County of Stanislaus* (2020) 10 Cal.5th 479. There, this Court ruled that an agency violated CEQA by categorically exempting as "ministerial" project approvals over which the agency retained some discretionary approval authority. For a second example, the Rivers Alliance filed an amicus curiae brief in the matter *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918. There, this Court ruled that a city's environmental impact report was inadequate because it omitted consideration of potentially environmentally sensitive habitat areas.

In sum, Amici can assist this Court's resolution of this case. They are familiar with this proceeding's litigation history and statutory context. They are vitally interested in the fisheries and other public trust resources and uses that are threatened by excessive diversions from and mismanagement of dams on California's rivers including the Kern River. And, they possess unique expertise and perspectives relevant to analysis of the water management issues this litigation raises. Accordingly, their proposed brief will assist this Court in addressing the complex issues posed here.

Amici's preparation and submission of their Amicus Curiae Brief was not funded by any third parties.

Accordingly, Amici respectfully request this Court's leave to file their proposed Amici Curiae Brief, which follows.

Dated: May 4, 2026

Respectfully submitted,
/s/ Stephan C. Volker
Stephan C. Volker
Attorney for Proposed Amici Winnemem Wintu Tribe, San Francisco Crab Boat Owners Association, North Coast Rivers Alliance, and California Sportfishing Protection Alliance

PROPOSED AMICI CURIAE BRIEF OF WINNEMEM WINTU TRIBE, SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION, NORTH COAST RIVERS ALLIANCE, AND CALIFORNIA SPORTFISHING PROTECTION ALLIANCE

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I. INTRODUCTION

The Opinion in *Bring Back the Kern v. City of Bakersfield* ("Opinion") (2025) 110 Cal.App.5th 322, should be reversed because it construes Fish and Game Code section 5937 in a manner that needlessly undermines, rather than properly advances, this statute's purpose to preserve the public's fisheries. By upending this statute's presumption of constitutionality and inverting the burden of proof to show otherwise, the Opinion thwarts implementation of the Legislative scheme and the public trust doctrine it codifies. The trial court correctly ruled that the Legislature has already struck the constitutional balance in favor protecting the public's fisheries.

The Opinion's novel theory that article X, section 2 of the Constitution allows the courts to endlessly second-guess this legislative decision disregards section 2's express assignment of this balancing task to the Legislature. Its holding that the public must prove, again and again, the value of maintaining habitat for fish each time it is threatened by competing water uses erects an impossible obstacle to the statute's – and the doctrine's – effectuation.

Respecting the California Constitution's assignment of this balancing task to the Legislature is necessary not just to assure that the public receives the full measure of the benefits of section 5937 and the public trust doctrine it implements. It is also compelled by overarching separation of powers principles. In adopting by an overwhelming majority what is now article X, section 2 of the California Constitution in 1928, the public emphatically rejected this

Court's decision in *Herminghaus v. Southern California Edison Co.*(1926) 200 Cal. 81, 116-117*,* to overrule (and condemn as an improper "arrogat[ion]" of power) the Legislature's adoption of reasonable and beneficial use requirements for riparian water users through enactment of sections 11 and 42 of the 1913 Water Commission Act. (*Gin S. Chow v. City of Santa Barbara* ("*Gin S. Chow*") (1933) 217 Cal. 673, 623.) This Court should not make the same mistake twice by questioning the Legislature's proper exercise of its express authority under section 2 to adopt section 5937 to strike the balance in favor of preserving fish.

Of course all parties claiming riparian or appropriative water rights in a waterway are entitled to notice and an opportunity to prove that compliance with section 5937 is "manifestly unreasonable" as applied in a particular case. But compliance with this legislative command is presumptively constitutional unless and until an affected party proves otherwise. Here, they will be afforded an opportunity to make this showing on remand when the trial court fashions a remedy.

For these reasons, this Court should reverse the Opinion and remand this matter so that the trial court may properly enforce section 5937's mandate that the owner of the six dams on the Kern River at issue "allow sufficient water at all times to pass . . . over, around or through the dam[s] to keep in good condition any fish that may be planted or exist below the dam[s]." (*Id*.)

II. SECTION 5937 IS A LEGISLATIVE EXPRESSION OF THE PUBLIC TRUST DOCTRINE.

California's fisheries and the waters they inhabit are public resources that belong to all the people and are held in trust by the State for their benefit. As this Court explained more than 125 years ago,

> "[t]he dominion of the state for the purposes of protecting its sovereign rights in the fish within its waters, and *their preservation for the common enjoyment of its citizens* . . . . extends to all waters within the state, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the state."

(*People v. Truckee Lumber Co.* (1897) 116 Cal. 397, 400-401 (emphasis added).) California's public waters and the fisheries they support fall within the protective ambit of the public trust doctrine, which underpins the public's rights to use the State's waters for navigation, commerce and fisheries. (*National Audubon Society v. Superior Court* ("*National Audubon*") (1983) 33 Cal.3d 419, 425.)

The Opinion recognizes, as it must, that "[o]ne legislative expression of public trust values is section 5937." (110 Cal.App.5th at 345.) Section 5937's reach is as broad as that doctrine, encompassing all waters that historically supported fish. (*California Trout, Inc. v. State Water Resources Control Board* ("*California Trout I*") (1989) 207 Cal.App.3d 585, 630.) The *California Trout* Court likened the public's enduring entitlement to fish the State's waters to an inalienable property right. (*Id*.) It explained that even

on non-navigable streams where public rights of navigation are attenuated, the public's fundamental right to fish remains in full vigor:

> "From the foregoing we conclude that a variety of public trust interests pertain to non-navigable streams which sustain a fishery. (See Walston, *The Public Trust Doctrine in the Water Right Context: The Wrong Environmental Remedy* (1982) 22 Santa Clara L.Rev. 63, 85.) This conclusion is consistent with and supported by various elements of California law. Wild fish have always been recognized as a species of property the general right and ownership of which is in the people of the state. (*People v. Stafford Packing Co*. (1924) 193 Cal. 719, 727 [227 P. 485]; also see e.g. *Geer* v. *State of Connecticut* (1895) 161 U.S. 519 [40 L.Ed. 793, 16 S.Ct. 600] tracing the roots of this doctrine from ancient Greek and Roman law; see generally, Cal. Const., art. I, § 25.) "The title to and property in the fish within the waters of the state are vested in the state of California and held by it in trust for the people of the state [citations]." (*People v. Monterey Fish Products Co*. (1925) 195 Cal. 548, 563 [234 P. 398, 38 A.L.R. 1186].) This trust interest is the basis of the holding in *People v. Truckee Lumber Co., supra*. (*People v. Stafford Packing Co., supra*, 193 Cal. at p. 727.)"

(*California Trout I* at 630.)

Recognizing the vital role that the Delta plays in safeguarding California's public trust resources including in particular its imperiled fish and wildlife, the Legislature has commanded that

> "[t]he longstanding constitutional principle of reasonable use and the public trust doctrine *shall be* the foundation of state water management policy and *are particularly important and applicable to the Delta*."

(Water Code § 85023 (emphases added)).

Consistent with the public trust doctrine's immutable nature, section 5937 implements its core tenet that the State may not abandon, surrender or abrogate the public's rights to fish. As the *California Trout I* Court explained,

> "The 'public trust' interest as to fishery in a non-navigable stream is in the nature of a state "property" interest. One may not oust the state from such an interest by operation of a statute of limitations. (See e.g., *People v. Kerber* (1908) 152 Cal. 731, 732-736 [93 P. 878].) The reason for this is similar to that which underpins the limitations on estoppel against the state, discussed *ante*. "'The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights.'" (*Id*., at p. 734.)

(*Id*., 207 Cal.App.3d at 630-631.) Consequently, the State Water Resources Control Board ("State Water Board") has "a plain legal duty" to condition every water license it issues "upon compliance with section 5937." (*Id*.)

Because the doctrine impresses the State Water Board with a continuous affirmative duty to advance the public's rights thereunder, it may abandon the right only in the "rare" circumstance where abandonment of that right is "consistent" with the purposes of the trust. (*San Francisco Baykeeper Inc. v. State Lands Com.* ("*Baykeeper II*") (2018) 29 Cal.App.5th 562, 569 (emphasis added), quoting *San Francisco Baykeeper, Inc. v. State Lands Com.* ("*Baykeeper I*") (2015) 242 Cal.App.4th 202, 234 and *National Audubon*, 33 Cal.3d at 441. Thus, in overturning the State Lands

Commission's allowance of sand mining in San Francisco Bay, the court of appeal held that the doctrine "imposes an obligation on the state trustee 'to protect the people's common heritage of streams, lakes, marshlands and tidelands, *surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust*.'" (*Id*. (emphasis added).) The court reiterated the settled law that the doctrine "impose[s] an affirmative duty" on the state trustee "to take the public trust into account" before authorizing private parties to extract public resources from the State's waters. (*Baykeeper II*, 29 Cal.App.5th at 570-571.)

A fortiori, diverting the entire flow of the Kern River for non-public trust uses as the City of Bakersfield admits it has done here – leaving no water for fish for decades – harms the public far more profoundly than did the modest sand extraction disallowed because of the Commission's deficient public trust analysis in *Baykeeper I*. As this Court held more than five decades ago, the doctrine protects not just activities associated with traditional uses of public waters such as navigation, commerce and fisheries, but also "the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." (*Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260.)

Removing the entire flow of a river as Bakersfield did here – in contrast to extracting just a small fraction of the San Francisco Bay's

sandy bottom in *Baykeeper I* – impacts a far-reaching and deeply intertwined complex of diverse river-dependent public resources and uses. These resources and uses include erosion-preventing riparian vegetation and the wildlife it supports, recharged groundwater storage supplying surrounding wells and the myriad public and private uses that rely on them, water-borne recreation and the many healthy activities it embraces including swimming, boating, paddle-boarding, scientific study, nature photography, sketching and painting, riverside exploring, hiking, picnicing, and scenic appreciation, educational field trips for students and wildlife appreciation societies, ecological preservation of the aquatic and riverine environments, and public use and enjoyment of the fish, waterfowl and other wildlife that inhabit the river including both recreational and commercial fishing.

This broad array of public uses that benefit from restoration of a river's flows is accorded special protection by the public trust doctrine against harmful degradation and exploitation. Although "the state trustee has broad discretion . . . to promote [one public trust use] over other legitimate trust uses," it does not have discretion to promote *non*-public trust uses over legitimate trust uses such as those summarized above. (*Baykeeper II*, 29 Cal.App.5th at 577.) But here, the Court of Appeal did exactly that. It held that diversions of water for irrigation – a non-public trust use – that deprive the Kern River of the flows essential for fish to survive may not be enjoined by the trial court as the plaintiffs have requested unless the plaintiffs can prove that leaving in the river sufficient water to keep fish in good condition

would not unreasonably impair other existing uses of the water by the irrigation districts and other diverters who have been receiving the entire flow of the Kern River for decades. (Opinion, 110 Cal.App.5th at 351-355.)

The Opinion overlooks the fact that in adopting what is now article X, section 2 of the California Constitution, the public voted overwhelmingly to place the public's right to use the State's waters – enshrined in the venerable public trust doctrine and codified in section 5937 – in the able hands of the Legislature, which article X, section 2 granted authority to "enact laws in furtherance of" the reasonable use doctrine. In doing so, the public wrested control over waterway diversions away from the courts and "clearly and expressly delegate[d] [it] to the Legislature." (*Fullerton v. State Water Resources Control Board* (1979) 90 Cal.App.3d 590, 597.) The Opinion glosses over the public's explicit selection of the Legislature – *rather than* the courts – as the branch of government given responsibility to "enact laws in the furtherance of the policy in this section contained." (Cal. Const., art. X, § 2.)

None of the foregoing suggests in any way that affected private property owners should be denied their due process rights to notice and an opportunity to prove that the Legislature's exercise of its Constitutionally-conferred authority to protect fish habitat might be manifestly unreasonable as applied to them. But the burden of proof must fall on those seeking to challenge the Legislature's decision in a particular case, not on the intended beneficiaries of section 5937

whose interests in preserving fish and the ecological health of the public waters they inhabit are much more diffuse and lacking the remunerative motivation of irrigators and other diverters who benefit financially from the water they divert.

III. AMICI ARE THE HUMAN FACE OF THE PUBLIC TRUST DOCTRINE

The public whose interests section 5937 is intended to protect come from many walks of life and span the cultural, social and economic spectrum. They include Native Americans whose ancestors lived in harmony with nature for thousands of years before white settlement pushed them from their homes and took the lands and waters on which they had subsisted. They are fishing men and women whose family-owned boats have been plying the cold waters of San Francisco Bay to harvest its fish and crustaceans for local markets for more than a century. They include workers who have toiled in the orchards and fields to harvest their fruits, nuts and vegetables, or canned and packaged the harvest and baled the hay during the week, and taken their families to rivers on weekends to swim, fish, picnic and enjoy the quiet solitude of their peaceful flowing waters. To them, California's rivers are their remaining direct connection to nature and the pastoral life enjoyed by many generations before them.

Without the public trust doctrine that protects their ability to freely access and enjoy these waterways and the fish, wildlife and natural splendor they support, Amici's deeply palpable, and in many

cases cultural and spiritual, bonds with the natural world would be profoundly diminished. For members of Amicus Winnemem Wintu Tribe, the return last year of chinook salmon to spawn in the McCloud River and its headwaters – a phenomenon not seen for more than 70 years – is nothing short of a miracle that reaffirms the enduring beneficence of the Creator. For all Amici, protecting and restoring California's beleaguered rivers is an essential first step in averting extinction of California's iconic commercial and sports fisheries, including salmon, steelhead, and sturgeon, and recovering long-denied balance in our State's watershed and riverine management. Amici's specific interests and concerns are summarized below.

Amicus Winnemem Wintu Tribe is a Native American Tribe recognized by the State of California whose aboriginal territory encompasses the upper watersheds (i.e., above Shasta Dam) of the Sacramento River including in particular the McCloud River. The Tribe's cultural identity is inextricably linked to the McCloud and its salmon. Indeed, "Winnemem" is the Tribe's name for the McCloud River, along whose banks the Tribe has lived in harmony with nature from time immemorial. Construction of Shasta Dam on the Sacramento River in 1944 flooded many of the Tribe's ancestral lands and cultural sites, and prevented salmon from migrating to and from the McCloud River.

The resulting loss of the chinook ("king") salmon fishery, on whom the Tribe historically relied for sustenance and spiritual

strength, crippled the Tribe's ability to engage in its traditional subsistence and religious practices. Subsequent erection and mismanagement of the McCloud Dam upstream on the McCloud River further intruded upon the Tribe's traditional lands, degraded habitat for the river's native fishery, and impeded the Tribe's ability to continue and restore its historic cultural practices. Both dams hamper and obstruct ongoing efforts to reestablish the McCloud River's native salmonid fishery. Nonetheless, as a result of years of hard work and close cooperation between the Tribe and the California Department of Fish and Wildlife and others to reintroduce salmon to the upper watershed of the Sacramento River, a small number of chinook salmon returned to the McCloud River to spawn in 2025, following their absence for more than 70 years. (See: CDFW, Documentation of Winter-Run Chinook Salmon Spawning in the Lower McCloud River July 2025, Memorandum, August 8, 2025; DWR, Four Years of Innovation and Teamwork: DWR Applies Science and Engineering to Support Winter-Run Chinook Salmon on the McCloud River, January 22, 2026, available at: https://water.ca.gov/News/Blog/2026/Jan-2026/DWR-Applies-Science-and-Engineering-to-Support-Winter-Run-Chinook-Salmon-on-the-McCloud-River.) This Court's ruling that section 5937 is enforceable would reinvigorate and reinforce these ongoing efforts by conferring new legal tools for righting a deeply unjust wrong.

Amicus San Francisco Crab Boat Owners Association is a California corporation whose members operate small, family-owned

fishing boats that harvest Dungeness crab, wild California king salmon, herring and other local species that live in the cold waters of San Francisco Bay and the Pacific Ocean. Formed in 1913 to protect that historic fishery for sustainable harvest, the Association has been practicing conservation management for more than a century to ensure that the rich seafood fisheries of the Bay and the Pacific continue to feed future generations of Californians.

Construction and mismanagement of dams on rivers tributary to San Francisco Bay has destroyed and degraded habitat needed by the salmonid and other fisheries on which the Association's members depend for their livelihoods. They are harmed by dam owners who fail to allow sufficient water to pass over, around or through the dams to keep in good condition fish that exist below these dams. Their mismanagement has caused river flows below their dams to drop far below the minimum flows required to keep fish in good condition. These deadly low flows have directly caused the collapse of the commercial fishery, particularly for salmon. As a result, the Pacific Fisheries Management Council has been forced to close the commercial salmon fishery in California for each of the past three years. (See: Nor-Cal Guides & Sportsmen's Association, PFMC Recommends Limited Recreational Ocean Salmon Season, Closure for Commercial Salmon Fishing, April 15, 2025, available at https://ncgasa.org/2025/04/16/pfmc-recommends-limited-recreational-ocean-salmon-season-closure-for-commercial-salmon-fishing/.) This Court's ruling that section 5937 is enforceable will greatly assist and

reinforce the Association's ongoing efforts to restore native fish populations in California..

Amicus California Sportfishing Protection Association (Sportfishing Association) is a non-profit corporation organized under California law whose thousands of members (including those belonging to its member organizations) reside and recreate in California's rivers and lakes throughout the State. Its members are duly licensed sport fishing anglers committed to the preservation and enhancement of California's public trust fisheries and enforcement of environmental laws.

To that end, the Sportfishing Association's members have been involved for decades in public education and advocacy efforts to protect and restore California's rivers, working both to reduce pollution and to increase flows as necessary to protect and restore habitat for California's native fishes. They are harmed by dam owners who fail to allow sufficient water to pass over, around or through the dams to keep in good condition fish that exist below these dams. This Court's ruling that section 5937 is enforceable will provide much needed legal authority to support the Sportfishing Association's ongoing efforts to restore native fish populations in California.

Amicus North Coast Rivers Alliance (Alliance) is a non-profit unincorporated association with members throughout Northern California who use and enjoy California's rivers and watersheds for recreation, aesthetic enjoyment and scientific study. The Alliance

was formed three decades ago to protect California's rivers and their watersheds from the harmful effects of excessive water diversions, poor dam operation, pollution, and other forms of environmental degradation. To that end, the Alliance's members regularly participate in public hearings and online and zoom meetings regarding, and review and submit comments concerning, proposals by local, state and federal agencies to construct, raise, or alter the operation of dams on California rivers.

The Alliance's members make frequent use of California rivers for fishing and other forms of recreation, and are directly harmed by dam owners who fail to allow sufficient water to pass over, around or through the dams to keep in good condition fish that exist below these dams. This Court's ruling that section 5937 is enforceable will provide vital legal support for the Alliance's ongoing efforts to restore native fish populations in California.

In summary, all four Amici have been engaged for decades in educational and advocacy activities before local, state and federal administrative agencies and state and federal courts to save the imperiled fish and wildlife species that inhabit the Delta and its tributaries from extirpation. The judicial proceedings Amici have brought resulted in many published rulings pertinent to the obligations of dam operators and water diverters to manage California's rivers in a manner that protects their fisheries as summarized on pages 5-6, *supra*.

This Court's clarification and enforcement of section 5937's

mandate that all dams be operated in a manner that assures adequate flows for fish will restore constitutionally-mandated balance to management of California's watersheds and rivers. By doing so, this Court will enable the millions of Californians for whom the State holds in trust the waters flowing in these rivers, and the fish and wildlife that inhabit them, to use and enjoy their birthright.

IV. FACTUAL BACKGROUND

A. THE DELTA IS IN CRISIS BECAUSE DAM OPERATORS ARE NOT PROVIDING SUFFICIENT FLOWS FOR FISH

Throughout California, fish populations are plummeting.. Hardest hit are the commercial fisheries that support many of our small coastal communities such as Fort Bragg and Half Moon Bay. So severe is the collapse of the commercial fishery that salmon stocks – the backbone of California's commercial fishery since the State was founded in 1850 – have been closed by the Pacific Fisheries Management Council to all commercial fishing for the past three years. (Nor-Cal Guides & Sportsmen's Association, PFMC Recommends Limited Recreational Ocean Salmon Season, Closure for Commercial Salmon Fishing, April 15, 2025, available at https://ncgasa.org/2025/04/16/pfmc-recommends-limited-recreational-ocean-salmon-season-closure-for-commercial-salmon-fishing/.)

The Delta and its tributaries – and their associated sports and commercial fisheries – have been pushed to the brink of ecological collapse by decades of mismanagement by dam owners and operators. The National Marine Fisheries Service ("NMFS") and the United States Fish and Wildlife

Service ("FWS") have determined, in a series of decisions (detailed below) ordering the listing of Delta fish species under the federal Endangered Species Act (16 U.S.C. §1531 et seq.; "ESA"), that these species have suffered severe population declines, prompting their listing under the ESA. These expert fisheries agencies have shown that these catastrophic declines are due to widespread habitat degradation and inadequate freshwater flows caused by dams on the Delta's tributary rivers, and by related diversions that export excessive quantities of their waters for agricultural and urban consumptive uses.

The construction and operation of dams on nearly all major California rivers flowing into the Delta, including dams built and managed by the federal Bureau of Reclamation (Reclamation) such as Shasta Dam on the Sacramento River, Trinity and Lewiston Dams on the Trinity River (that divert its waters via the Clear Creek Tunnel to Whiskeytown Reservoir and thence to the Sacramento River), Folsom Dam on the American River, and Friant Dam on the San Joaquin River, and dams built and managed by the California Department of Water Resources ("DWR") such as Oroville Dam on the Feather River – coupled with exports from the Delta by the State Water Project (SWP) and the Central Valley Project (CVP), have destroyed the Delta's fragile ecological balance. These projects' storage and export facilities block native fish migration, prevent salmonid access to spawning reaches, decrease freshwater flows, reduce dissolved oxygen, and increase water temperature, salinity and concentrations of herbicides, pesticides and toxic agricultural runoff, in the Delta.

The Ninth Circuit Court of Appeals and the California Court of Appeal have issued many authoritative rulings documenting these declines. (*E.g.*, *San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971,

987 (9th Cir. 2014) ("SWP and CVP operations increase pollution, encourage the growth of non-native species, and create water shortages in the Delta that harm salmon"); *In re Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1034 ("the Delta is currently in an 'ecological tailspin'").)

Most notably, the one-two punch of dams and diversions has driven the Sacramento River winter and spring run Chinook salmon, Central Valley steelhead, North American green sturgeon and Delta smelt perilously close to extinction. Winter run Chinook salmon were initially listed as a federally threatened species in 1990 (55 Fed.Reg. 46515), and then due to continuing population declines, declared endangered in 2005 (70 Fed.Reg. 37160). Their critical habitat in the Sacramento River was designated in 1993. (58 Fed.Reg. 33212.) Spring run Chinook salmon were listed as threatened, and their critical habitat designated, in 2005. (70 Fed.Reg. 37160, 52488.) Central Valley steelhead were listed as threatened in 2000 (65 Fed.Reg. 52084) and their critical habitat designated in 2005 (70 Fed.Reg. 52488). The Southern Distinct Population Segment ("DPS") of North American green sturgeon was listed as threatened in 2006 (71 Fed.Reg. 17757) and their critical habitat designated in 2008 (73 Fed.Reg. 52084). Delta smelt were listed as endangered in 1993 (58 Fed.Reg. 12854) and their critical habitat designated in 1994 (59 Fed.Reg. 65256).

This sharp decline in the ecological health of the Delta and its tributaries has prompted the California Legislature to take long-overdue action to address its increasingly desperate plight. In 2009 it adopted the Delta Reform Act ("DRA"), Water Code section 85000 et seq., declaring that the Delta is the largest and most productive estuarine system on the West Coast of North and South America, and that its future is in peril.

(Water Code § 85002; see also, Public Resources Code ("PRC") §§ 29701 ("the Sacramento-San Joaquin River Delta is a natural resource of statewide, national, and international significance, containing irreplaceable resources"), 29706.) Recognizing that decades of excessive diversions of the Delta's freshwater inflow for export have pushed many of its iconic fish species to the brink of extinction, the Legislature declared that

> "[t]he Sacramento-San Joaquin Delta watershed and California's water infrastructure are *in crisis* and *existing Delta policies are not sustainable*."

(Water Code § 85001(a) (emphasis added).) The DRA established the Delta Stewardship Council and mandated its adoption of a Delta Plan to establish standards to guide development ("covered action") that impacts the Delta and its fish and wildlife. (Water Code §§ 85057, 85057.5, 85059, 85200-85225.30, 85300-85302.)

Litigation brought to enforce the Delta Plan and thereby prevent further degradation of the Delta has resulted in a number of rulings by the Court of Appeal recognizing both the importance of the Delta and its imperiled fisheries, and the urgent need to halt their further decline. As the Court of Appeal observed in *Department of Water Resources Environmental Impact Cases* (2024) 79 Cal.App.5th 556. 565, "the Delta is a 'critically important natural resource for California and the nation.'" (*Id*., quoting Water Code section 85002.) "It provides habitat for a vast array of aquatic and terrestrial species, offers a wide variety of recreational activities, supports extensive statewide infrastructure, and sustains a productive agricultural landscape rich in culture and history." (*Id.*, citing Water Code §§ 12981, subds. (a), (b), 85002, 85022, subds. (c), (d); see also, PRC §§ 29701, 29708, *In re Delta Stewardship Council Cases, supra,*

48 Cal.App.5th at 1027.)

Pursuant to the DRA's command, in 2010 the State Water Resources Control Board published a detailed report recommending "new flow criteria for the Delta ecosystem necessary to protect public trust resources" including flows needed to protect and restore the Delta's declining fisheries, finding that "[r]ecent Delta flows are insufficient to support native Delta fishes in habitats that now exist in the Delta." (Water Code § 85086, subd. (c)(1); California State Water Resources Control Board, Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem, August 3, 2010, available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf.)

B. PROPER INTERPRETATION AND ENFORCEMENT OF FISH AND GAME CODE SECTION 5937 WOULD HELP ADDRESS THE DELTA'S ECOLOGICAL CRISIS

All major tributaries of the Delta are dammed, and their releases to the Delta are controlled by the dam owners and operators. Most of the freshwater inflow to the Delta is water released from the large reservoirs owned and operated by the state and federal governments. Most prominent of these are five dams owned and operated by the Bureau of Reclamation – Shasta Dam on the Sacramento River, Trinity and Lewiston Dams on the Trinity River (that divert its waters via the 11-mile long Clear Creek Tunnel to Whiskeytown Reservoir and thence the Sacramento River), Folsom Dam on the American River, and Friant Dam on the San Joaquin River. (USBR, CVP Operations Overview, January 2018, available at: https://www.noaa.gov/sites/default/files/legacy/document/2020/Oct/0.7.115

.8663-000002.pdf; UC Davis, Alphabetical List of California Dams (over 40,000 acre feet), available at: http://wla.engineering.ucdavis.edu/dams/DamList.htm.) Shasta Dam stores up to approximately 4.5 million acre-feet (MAF), Trinity Dam on the Trinity River holds about 2.4 MAF, Folsom Dam on the American River holds about 1.0 MAF, and Friant Dam on the San Joaquin River stores about about .5 MAF. (*Id*.; USBR, Central Valley Project Website, available at: https://www.usbr.gov/mp/cvp/.) The California Department of Water Resources (DWR) owns and operates Oroville Dam on the Feather River, which stores about 3.5 MAF. (UC Davis, Alphabetical List of California Dams (over 40,000 acre feet), available at: http://wla.engineering.ucdavis.edu/dams/DamList.htm.) Local irrigation, water and flood control districts and agencies, regional and local public utilities, and other public and private entities own and operate dozens of dams on other tributaries. They include New Melones Dam on the Stanislaus River, which stores about 2.4 MAF, New Don Pedro Dam on the Tuolumne River, which holds about 2.0 MAF, and Camanche Dam on the Mokelumne River, which stores about .4 MAF. (UC Davis, Alphabetical List of California Dams (over 40,000 acre feet), available at: http://wla.engineering.ucdavis.edu/dams/DamList.htm.) The total storage of federal, state and local reservoirs whose releases are tributary to the Delta exceeds 30 MAF. (USBR, CVP Operations Overview, January 2018, available at: https://www.noaa.gov/sites/default/files/legacy/document/2020/Oct/0.7.115 .8663-000002.pdf; UC Davis, Alphabetical List of California Dams (over 40,000 acre feet), available at: http://wla.engineering.ucdavis.edu/dams/DamList.htm.)

A single acre-foot is the quantity of water required to flood an acre of land to a depth of one foot, and is equal to about 325,850 gallons. Thus, one million acre-feet would inundate one million acres (or 1,562.5 square miles) to a depth of one foot, or one hundred thousand acres (156.25 square miles) to a depth of ten feet. Thus, the millions of acre-feet stored and released each year by dams on tributaries flowing to the Delta offer significant opportunities to alter – and improve – its ecological health, and restore habitat for fish.

As these massive water storage figures attest, how dam owners and operators determine the quantity and timing of water they store and release holds great potential for increasing flows through the Delta at the critical times needed by imperiled fish to survive and thrive. A ruling by this Court that Fish and Game Code section 5937 requires these dam owners and operators to "allow sufficient water to pass through a fishway, or . . . over, around or through the dam, to keep in good condition any fish . . . below the dam," would reframe the regulatory paradigm. At a minimum, it would clarify the duties of dam owners and operators to comply with this section, providing them much needed guidance in fulfilling this statutory mandate. Potentially, it might identify pathways for reversing the Delta's "ecological tailspin." (*In re Delta Stewardship Council Cases, supra,* 48 Cal.App.5th at 1034.)

Whether in any individual case this statutory duty has already been met, or is shared with other dam owners and operators pursuant to existing agreements or parallel state or federal regulatory arrangements, is beyond the scope of this case. (See, e.g., *Water Audit California v. Merced Irrigation District* (2025) 111 Cal.App.5th 1147, 1185-1187 (discussing legal and factual nuances in applying related Fish and Game Code section

5935 to a particular dam in the context of a highly fact-specific regulatory history).) But ignoring section 5937's command because it might be difficult to apply in a particular case is not an option. (*Gin S. Chow*, 217 Cal. at 705-706 (declining an invitation to refrain from enforcing the California Constitution's "reasonable use" criterion due to the claimed difficulty of doing so).)

In summary, Amici represent the human face of the public whose rights to use and enjoy the native fisheries that inhabit California's rivers are at issue in this case. This Court has a rare opportunity to recognize and protect the public's statutory (and public trust) right to use and enjoy the native fisheries that inhabit waters below dams on California's rivers.

V. THE COURT OF APPEAL FAILED TO INTERPRET AND APPLY SECTION 5937 AND ARTICLE X, SECTION 2 CORRECTLY

A. SECTION 5937 IMPOSES MANDATORY, ENFORCEABLE DUTIES ON DAM OWNERS AND OPERATORS

Section 5937's command is clear and mandatory. It states:

> "The owner of any dam *shall* allow sufficient water *at all times* to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the [Department of Fish and Wildlife] to the owner of any dam to allow sufficient water to pass through a culvert, water gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway."

(*Id*., emphasis added.) "[T]he meaning of a statute derives from its text." (*California Trout I*, 207 Cal.App.3d at 599, fn. 3.) Consequently, "[t]he legislative will is perforce manifested in the language of the statute." (*Id*.) The text of section 5937 is unambiguous. It contains four salient provisions: each is clear, and each is mandatory.

First, this statute's reach is broad. It provides that the owners of "any" dam are subject to its commands. "[T]he 'word "any" means every.'" (*California State Auto. Assn. Inter-Ins. Bureau v. Warwick* (1976) 17 Cal.3d 190, 195, quoting *Davidson v. Dallas* (1857) 8 Cal. 227, 239.) The term "owner" includes any person or governmental entity "controlling" or "operating" a dam. (Fish & Game Code § 5900, subd. (c).)

Second, this statute's requirements are mandatory. Its commands use the word "shall," a "presumptively mandatory" term. (*Guardianship of Saul H*. (2022) 13 Cal.5th 827, 846 (shall is "presumptively mandatory").

Third, this statute's protection of fish never sleeps. It states that dam owners must allow sufficient water "at all times" to "pass over, around or through" the dam. "At all times" means this statute operates all day, every day, year round, to assure that fish are always protected. It recognizes that without sufficient water "at all times," fish would die. Fish must have sufficient water all the time, not just when convenient for the dam owner.

Fourth, this statute does not countenance failure. It requires dam owners to "to keep in good condition" "any fish" that may be planted or exist below the dam, all the time. It has only one measure of compliance: "good condition." Either the fish are in "good condition," which is mandatory at all times, or they are not, and the statute is violated. Thus, the statute places the burden on the dam owner to ascertain what flows are sufficient to keep fish in good condition, and then make sure those flows are always provided. The

statute's unwavering and unblinking focus is on just one thing: fish health.

B. SECTION 5937 SHOULD BE ENFORCED ACCORDING TO ITS PLAIN LANGUAGE

Section 5937's forceful text and corresponding intent leave no doubt that the Legislature expected this Court to enforce its mandate. Its four pillars of compliance command with one, unmistakable voice that all dam owners must, at all times, release sufficient water to keep all fish below dams in good condition, without exception. Where, as here, the statutory language speaks with such unambiguous clarity and conviction, "the courts have a duty to so apply it." (*California Trout I*, 207 Cal.App.3d at 599, fn. 3.)

The Opinion's contrary view, that article X, section 2 of the California Constitution grants courts authority to overrule the Legislature's enactment of section 5937's strict mandate to protect fish, is wrong as a matter of law, and contrary to the California Constitution's assiduous separation and protection of the people's power to legislate through their elected representatives from the judiciary's power to adjudicate, as shown in the next section of this brief.

C. SECTION 5937 FURTHERS RATHER THAN CONFLICTS WITH ARTICLE X, SECTION 2'S REASONABLE USE POLICY

As shown, section 5937 protects California's fisheries by requiring dam owners to allow sufficient water to pass over, around or through the dams to keep fish below the dams in good condition. This modest protection is essential, because without it, dam owners could simply release no water, killing all fish below their dams. That tragic result would be contrary to article X, section 2's reasonable use policy. Yet such a pernicious outcome

is the foreseeable consequence of the Opinion because it declines to enforce section 5937's requirement that dams release sufficient water for fish on the grounds it offends section 2's reasonable use limitation. Such a dire consequence of not enforcing section 5937 cannot be dismissed as conjecture: the City of Bakersfield admits it did *exactly that* for decades, killing all the fish in the Kern River with impunity.

Section 5937's modest but essential protection echoes the State's public trust doctrine, which likewise requires protection of California's rivers and the fish that inhabit them, in recognition of the fact that these resources are owned by the State and held in trust for the people. (*National Audubon*, 33 Cal.3d at 425, 441.) This strong public policy is "particularly important and applicable to the Delta," as confirmed by the Legislature's adoption of Water Code section 85023. That statute declares that "[t]he longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are *particularly* important and applicable to the Delta." (*Id.* (emphasis added).)

Yet these longstanding and compelling public policies requiring protection of the public's fisheries based on settled doctrinal and statutory law were, in the Opinion's view, insufficient to enable the plaintiffs' enforcement of section 5937 even under the extreme facts presented here. (110 Cal.App.5th at 351-356.) The Opinion's sole basis for refusing to enforce section 5937 consistent with its unambiguous terms and obvious intent is the Opinion's interpretation of the last sentence of article X, section 2. (*Id*. at 352-353.) That sentence reads as follows:

> "This section shall be self executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

(Art. X, section 2 (emphasis added).)

The Opinion construed this sentence to mean that the authority it *expressly* granted the Legislature to "enact laws in furtherance of [the section's] policy" was *tacitly* subordinated to the section's provision that it "shall be self-executing." (110 Cal.App.5th at 352-353.) "Self-executing," reasoned the Court, meant that the Legislature's authority to enact legislation to implement the section was itself subject to section 2's reasonable use limitation. (*Id*.) It explained: "Consequently, while the Legislature is free to enact statutes that further section 2's goals, those statutes operate *alongside* – rather than as the sole effective manifestation of – section 2's provisions." (110 Cal.App.5th at 352 (emphasis in original).) That being the case, the Opinion reasoned, it followed that courts could negate laws duly enacted "in furtherance of" section 2's reasonable use policy on the bootstrapped grounds that the courts were the final arbiters of whether such laws were actually "in furtherance of" section 2's reasonable use limitation. (110 Cal.App.5th at 352-353.)

There are three fatal flaws in the Opinion's reasoning. First, the Opinion overlooks the "well-established principle of statutory construction" that if "'the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution.'" (*In re Waters of Long Valley Creek Stream System* ("*In re Waters of Long Valley*") (1979) 25 Cal.3d 339, 349 (quoting *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 948).)

Viewed through the lens of this interpretive rule, section 5937 is manifestly constitutional because it is readily "capable of a meaning consistent with the requirements" of article X, section 2. (*Id.*) Section 2 expressly grants the Legislature full authority to "enact laws in the

furtherance of [section 2's reasonable use] policy." (*Id*.) It places no limitation on the Legislature's authority to enact such laws. There can be no serious debate that section 5937 is such a law, since its sole requirement – that dams release sufficient water to keep fish below the dams in good condition – is clearly "in furtherance of" section 2's reasonable use policy because it restrains dam owners from drying up rivers and killing all their fish. The Opinion's contrary holding is therefore in error.

The second fatal flaw in the Opinion is that it construes this same last sentence of section 2 to mean that the authority it *expressly* granted the Legislature to "enact laws in furtherance of [the section's] policy" was *tacitly* subordinated to the section's provision that it "shall be self-executing." (110 Cal.App.5th at 352-353.) This logical leap is directly contrary to the settled rule of construction that "the legislative will is perforce manifested in the language of the statute." (*California Trout I*, 207 Cal.App.3d at 599, fn. 3.) Courts give effect to what a statute or constitution says, not to what it does not say. Speculation about tacit implications is forbidden. "When statutory language is thus clear and unambiguous, there is no need for construction, and courts should not indulge it." (*In re Waters of Long Valley*, 25 Cal.3d at 348.)

Yet the Opinion dives right into this speculative swamp, with the result that it subordinates what section 2 actually says –its explicit grant of authority to the Legislature to enact laws in furtherance of the section – to the Opinion's speculation about what it did *not* say – speculation that this explicit grant of authority was nonetheless subordinate to the Court's views of what is permitted and what is not permitted "in furtherance" of section 2's reasonable use policy.

The Opinion asserts that because section 2 is "self-executing," less

deference is due the Legislature's decision regarding how best to implement section 2's reasonable use policy. (110 Cal.App.5th at 352-353.) This assertion does not withstand scrutiny. The fact that section 2 is "self-executing" merely means that it applies where the Legislature has not yet enacted a law that implements the section. That is the most natural reading of this language, and one that conforms to the established rule that statutory and constitutional provisions should be harmonized where possible. (*In re Waters of Long Valley*, 25 Cal.3d at 349.) It is nonsensical to read this sentence as the Opinion does to mean that it makes no difference whether the Legislature has already enacted a law to implement section 2, because the courts will interpose their preemptive views of what section 2 means *anyway*. That interpretation renders section 2's express authorization of the Legislature to adopt laws to implement it a nullity. Interpretations that render words a nullity are to be avoided, not embraced. (Civ. Code § 3541 ("An interpretation which gives effect is preferred to one which makes void.")

Here, of course, the Legislature did enact such a law. Under section 2, it had authority to do so, and its exercise of that authority is entitled to the deference normally accorded such statutes. In the words of this Court, if "'the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution.'" (*In re Waters of Long Valley*, 25 Cal.3d at 349 (quoting *San Francisco Unified School Dist. v. Johnson, supra*, 3 Cal.3d at 948).) But contrary to this settled rule, the Opinion affords section 5937 no deference whatsoever, and interposes its own view, displacing and nullifying the Legislature's decision to adopt section 5937 altogether.

The Opinion fails to acknowledge the palpable irony of its stated reliance on section 2 to question the Legislature's express authority to implement that section. (110 Cal.App.5th at 352-353.) The entire purpose of the people's adoption of section 2 was to repudiate the Supreme Court's ruling in *Herminghaus v. Southern California Edison Co., supra,* 200 Cal. at 116-117. (*California Trout I*, 207 Cal.App.3d at 623- 625.) *Herminghaus* had overruled (and condemned as an improper "arrogat[ion]" of power) the Legislature's adoption of reasonable and beneficial use requirements for riparian water users through enactment of sections 11 and 42 of the 1913 Water Commission Act. (*California Trout I*, 207 Cal.App.3d at 623.) Section 5937 is exactly what the public authorized their elected representatives – the Legislature – to enact. (*California Trout I*, 207 Cal.App.3d at 625.) And, the Court of Appeal's refusal in this case to enforce section 5937 threatens to repeat what might be viewed as the unfortunate judicial overreach the public sought to overcome by adopting section 2 in the first place.

The Opinion's third fatal flaw is procedural, and relates to and exacerbates the Opinion's upending of section 5937's presumption of constitutionality. The Opinion inverts the normal burden of proof by requiring the public interest plaintiffs to prove that this statute is constitutional and enforceable, separate and apart from the entirely appropriate and usual burden that plaintiffs bear as movants seeking a preliminary injunction. The Opinion states that because article X, section 2 is "self-executing," its rule of reasonable use "must be made effectual in all cases," meaning that statutes like section 5937 that implement section 2 must first be proven consistent with section 2 before they may be enforced. (110 Cal.App.5th at 351, quoting *Gin S. Chow*, 217 Cal. at 700.)

This is fundamental error, because such statutes are presumed constitutional and thus their enforcement does not require a showing of their constitutionality by the plaintiff. Where, as here, the Legislature has exercised its "right and obligation to enact laws in furtherance of" article X, section 2, "the view enacted by the Legislature is entitled to deference by the judiciary." (*California Trout I*, 207 Cal.App.3d at 624-625, citing *In re Waters of Long Valley*, 25 Cal.3d at 351-352.) The Court of Appeal's reliance on *Gin S. Chow* to justify the Opinion's use of section 2 to question the Legislature's authority to enact section 5937 is likewise in error. (110 Cal.App.5th at 352, 355.) As *California Trout I* pointed out, *Gin S. Chow* "did not consider such a question." (207 Cal.App.3d at 624.) Contrary to the Opinion's implication, *Gin S. Chow* did not discuss or rely on section 2's "self-executing' clause at all.

The Opinion's concern that water rights holders should have a remedy to prevent unreasonable interpretations of section 5937 is easily addressed by far less drastic measures. Should an affected party wish to challenge section 5937's constitutionality, it may always raise such a claim, either by separate action attacking this statute on its face, or by affirmative defense claiming the statute is unconstitutional as applied to that party in a particular case. But the burden of proof must fall on the party challenging section 5937, not on the party seeking its enforcement. (*California Trout I*, 207 Cal.App.3d at 624-625; *California Trout Inc. v. Superior Court* ("*California Trout II*") (1990) 218 Cal.App.3d 187, 201.) And, that burden is a heavy one, because "[o]rdinarily, absent a plain constitutional mandate, a conflict in public policy between the view of the judiciary and the Legislature must be resolved in favor of the latter." (*California Trout I*, 207 Cal.App.3d at 624-625.)

In sum, and as the *California Trout* cases recognize, section 5937 reflects the Legislature's determination that requiring dam owners to release sufficient water to keep fish in good condition is presumptively reasonable, whereas allowing them to dry up the river they dammed and kill the fish therein is not. (*Id*.) By enacting section 5937, the Legislature exercised its expressly delegated authority to make article X, section 2 "effectual." Compliance with this modest fish flow requirement is a small price for the dam owner to pay for receiving permission to dam the public's river – and impact its public fishery – in the first place.

D. A PARTY CONTESTING ENFORCEMENT MUST PROVE THAT PROVIDING WATER FOR FISH IS "MANIFESTLY UNREASONABLE" AS APPLIED IN THAT CASE

As shown, any party adversely affected by implementation of section 5937 has a remedy. All such parties are entitled to due process notice and an opportunity to challenge any such implementation on grounds available under the law. And, they may raise such challenges by filing timely litigation opposing an implementation proposal, or by raising affirmative defenses to litigation brought to compel implementation of section 5937. And, as the *California Trout I* Court explained, "the Legislature's broad authority is not unlimited. If a statute sanctioned a *manifestly unreasonable* use of water, it would transgress the constitution." (*California Trout I*, 207 Cal.App.3d at 625.)

E. THIS COURT SHOULD REVERSE WITH DIRECTIONS SO THE TRIAL COURT MAY FASHION AN APPROPRIATE REMEDY

The Opinion is fundamentally flawed as shown above. The Court of

Appeal erred in holding that before granting a preliminary injunction under section 5937, courts may second-guess the Legislature's determination that keeping fish in good condition is a reasonable use of water. While affected parties may challenge section 5937's constitutionality on an as-applied basis, they bear a heavy burden to show that application of this statute is "manifestly unreasonable."

Accordingly, this Court should reverse the Opinion and direct the trial court to reinstate its preliminary injunction to prevent irreparable harm to the fish and other public trust resources in the Kern River. This Court's remand order should enable the trial court to fashion an appropriate permanent remedy. The specific parameters of that remedy are, of course, matters for the parties to adjudicate at that time, and thus beyond the scope of this appeal.

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeal's judgment, and remand with directions to the trial court to reinstate the preliminary injunction to prevent irreparable harm to fish pending the court's fashioning of an appropriate remedy consistent with applicable law.

Dated: May 4, 2026

Respectfully submitted,

/s/ Stephan C. Volker

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CERTIFICATE OF WORD COUNT

Under Rule 8.504(d)(1) of the California Rules of Court, the undersigned hereby certifies that PROPOSED AMICI CURIAE WINNEMEM WINTU TRIBE, ET AL.'S PROPOSED AMICI CURIAE BRIEF is in 14-point proportional type and contains 8,419 words as counted by WordPerfect X7, the word processing software used to prepare this brief.

Dated: May 4, 2026

/s/ Stephan C. Volker

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Attorney for Proposed Amici Curiae
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PROOF OF SERVICE

I am a citizen of the United States of America; I am over the age of 18 years and not a party to the within entitled action; my business address is 1633 University Avenue, Berkeley, CA 94703. On May 4, 2026, I served a true copy of the following document entitled:

> **APPLICATION TO FILE, AND PROPOSED BRIEF, OF PROPOSED *AMICI CURIAE* WINNEMEM WINTU TRIBE, SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION, NORTH COAST RIVERS ALLIANCE, AND CALIFORNIA SPORTFISHING PROTECTION ALLIANCE IN SUPPORT OF PLAINTIFFS AND RESPONDENTS BRING BACK THE KERN, ET AL.**

in the above-captioned matter (1) on each of the persons registered with TrueFiling through the TrueFiling e-service process on the California Supreme Court's website for this proceeding, and (2) by arranging for a true copy of said document to be placed in a prepaid envelope for collection and deposited in the United States mail at Berkeley, California addressed to:

Honorable Gregory A. Pulskamp
Kern County Superior Court, Division J
Metropolitan Division Justice Building
1215 Truxton Avenue
Bakersfield, CA 933401

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 4, 2026 at Belchertown, Massachusetts.

/s/ Stephanie L. Clarke

Stephanie L. Clarke